DISTRICT COURT, COUNTY OF BOULDER, STATE OF COLORADO **Boulder County District Court** **Boulder County Justice Center** **1776 6th Street** **Boulder, Colorado 80302** MILE-HI SKYDIVING CENTER, INC., Plaintiff, v. CITY OF LONGMONT, Defendant.	**▲ COURT USE ONLY ▲**
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CITY OF LONGMONT'S MOTION TO DISMISS AMENDED VERIFIED COMPLAINT	

Defendant City of Longmont ("Longmont") hereby moves to dismiss the Amended Verified Complaint pursuant to Colorado Rules of Civil Procedure 12(b)(1) and 12(b)(6). Counsel for Longmont and Mile-Hi Skydiving Center ("Mile-Hi") have conferred regarding this Motion, C.R.C.P. 121, § 1-15(8), and Mile-Hi opposes it.

INTRODUCTION

Mile-Hi seeks injunctive and declaratory relief based *only* on alleged violations of certain conditions of federal grants the City received from the Federal Aviation Administration ("FAA") for the improvement of Vance Brand Municipal Airport ("Airport"). Specifically, Mile-Hi asserts that Longmont's enforcement of an Airport-wide permitting system, including permit fees, and Longmont's efforts to enforce safety and operational rules violate Longmont's FAA grant conditions. Mile-Hi asserts no claims under any other federal law, state law, local law, or contract between Longmont and Mile-Hi. Mile-Hi does not even ask this Court to adjudicate its grant claims; it asks only that the Court enjoin Longmont from enforcing its long-standing local laws and airport rules while Mile-Hi pursues its claims before the FAA, which has primary jurisdiction over such claims, and further asks the Court to stand by in case declaratory relief is needed *after* the FAA adjudicates Mile-Hi's claims.

The City vigorously denies that it has violated any of its FAA grant conditions and will rebut those claims in detail and on the merits before the FAA. In short, in near-constant coordination with the FAA, Longmont has adopted a series of Airport rules and regulations to assure that Mile-Hi complies with safety standards, to assure adequate revenues to meet Airport expenses, and to balance Mile-Hi's operational needs with other demands on Airport property and resources. Mile-Hi has resisted those efforts, preferring that it be allowed free rein to do whatever

it pleases on the Airport and tie up nearly half the Airport without covering its share of costs, with little or no regard for other Airport users.

This Court, however, lacks jurisdiction over that underlying dispute and lacks the jurisdiction to provide Mile-Hi with the interim relief if seeks because the FAA has primary jurisdiction over Mile-Hi's claims regarding FAA grant conditions, subject only to review by a U.S. Court of Appeals. The exclusive federal enforcement process deprives this Court of jurisdiction over those claims and deprives Mile-Hi of any private right of action. Moreover, because the FAA's enforcement process is not complete, Mile-Hi has failed to exhaust its administrative remedies, which also deprives this Court of jurisdiction, including specifically the jurisdiction to award interim relief pending completion of the FAA administrative enforcement action. Finally, Mile-Hi's declaratory judgment claim must be dismissed for the additional reason that it is premature and speculative. In short, there is no controversy because the parties cannot disagree about the meaning of a decision that does not yet exist and there is no basis for the Court to clutter its docket on the speculative possibility that Mile-Hi might prevail on some theory in front of FAA at some time in the future.

SUMMARY OF THE KEY FACTS

Longmont vigorously disputes most of the factual assertions and all of legal conclusions asserted in the Complaint. For purposes of this Motion to Dismiss, however, it is not necessary to detail those disputes. Because Longmont's Motion is based on the lack of jurisdiction, there are only a few facts the Court needs to consider.

Prior to December, 2017, Longmont permitted Mile-Hi to use a large area south of the runway for a Parachute Drop Zone ("PDZ"). Amended Verified Complaint ("Am. Compl.") at

¶ 11. In December, 2017, Longmont adopted a new permit structure that required a fee of $0.1073 per square foot and designated a new, smaller area for parachute landings. *Id.* at ¶ 19, Ex. A-16. Subsequently, Longmont and Mile-Hi agreed to define several smaller PDZ's within that redesignated area to reduce the cost of Mile-Hi's permit fees. *Id.* at ¶¶ 20-21. In October, 2018, Longmont consolidated those several PDZ's into a single PDZ of 338,000 square feet, *id.* at ¶ 22, which was slightly larger than the total square footage of the multiple PDZ's Mile-Hi itself designed and used since early 2018.

On or about March 8, with no notice, Mile-Hi filed a complaint with the FAA alleging that Longmont's actions violated certain conditions of grants Longmont had received from the FAA for various airport improvement projects. *Id.* at ¶ 28. As discussed below, that complaint is part of the process Congress and the FAA have created as the exclusive method of resolving claims that an airport has violated the conditions of FAA grants. Because those procedures are set forth in 14 C.F.R. Part 16 the process is referred to as the "Part 16 process." Several days later, Mile-Hi filed this suit.

FEDERAL STATUTORY AND REGULATORY FRAMEWORK

Because Mile-Hi's claims are based solely on the FAA grant conditions, it is important for the Court to understand the federal statutory and regulatory origin of, and context for, those conditions because that federal regulatory program circumscribes the Court's jurisdiction.

The grant conditions Mile-Hi alleges Longmont violated are imposed pursuant to the Airport and Airway Improvement Act of 1982, 49 U.S.C. 47101-47142 ("AAIA"), which provides grants to public-use airports like Longmont's. The AAIA authorizes the FAA to approve an application for an Airport Improvement Program grant only upon receiving certain statutorily

enumerated "written assurances, *satisfactory to the [FAA]*." 49 U.S.C. § 47107(a) (emphasis added). The FAA is then responsible for "ensur[ing] compliance" with these grant conditions. 49 U.S.C. § 47107(g). Specifically, Congress authorized the agency to "prescribe requirements for sponsors that the [FAA] considers necessary," 49 U.S.C. § 47107(g), as well as take any action it considers necessary to enforce the grant conditions, "including conducting investigations and public hearings, prescribing regulations and procedures, and issuing orders," 49 U.S.C. § 47122(a). In the event an airport sponsor fails to comply with the grant conditions, the FAA may apply to an appropriate U.S. District Court to seek an injunction requiring the airport to comply with the grant conditions. 49 U.S.C. § 47111(f); *see also* 49 U.S.C. §§ 46105-46107 (authorizing the FAA to issue orders and emergency orders and to seek an injunction in federal court to enforce those orders).

Pursuant to its authority under the AAIA, the FAA has developed a comprehensive administrative enforcement process that allows a party "directly and substantially affected" by an airport's alleged violation of the grant conditions to compel the FAA's formal adjudication of its complaint. 14 C.F.R. §§ 16.21–34. Appeals from the FAA's decisions must be made exclusively to a U.S. Court of Appeals. 49 U.S.C. § 46110(a). Section 46110 confers exclusive jurisdiction on the U.S. Courts of Appeals and "preempt[s] the original jurisdiction of state courts as well as federal district courts" to adjudicate issues subject to judicial review under Section 46110. *City of Rochester v. Bond*, 603 F.2d 927, 934 (D.C. Cir. 1979) (dismissing challenge to an FAA order under the Federal Aviation Act, which is also subject to Section 46110).

With respect to skydiving, FAA regulations expressly require skydivers, such as Mile-Hi, to obtain prior permission from the airport operator before skydiving at an airport. 14 C.F.R.

§ 105.23(b). The FAA also authorizes airport operators to designate PDZs in appropriate locations to assure both a safe area for parachutists and to accommodate other airport users. FAA, Advisory Circular 105-2E, *Sport Parachuting* at pages 5-6 (Dec. 4, 2013) (attached as Exhibit 1 for the Court's convenience). The designation of a PDZ is subject to review by the FAA. Am. Compl. ¶ 34. As Mile-Hi admits, the FAA is the "final arbiter" of issues of aviation safety, including the adequacy of a PDZ. *Id.*; *see also City of Burbank v. Lockheed Air Terminal Inc.*, 411 U.S. 624, 639 (1973) (Federal Aviation Act created a uniform and exclusive system of federal regulation in the field of air safety).

However, the airport operator has the initial responsibility to designate an appropriate PDZ and to otherwise assure that skydiving operations, like all operations on an airport, are conducted in a safe manner. The FAA has held that an airport operator can be in breach of its grant conditions by *failing* to regulate skydiving in order to address safety issues regarding skydiving operations. *Skydive Myrtle Beach, Inc. v. Horry Cty. Dep't of Airports*, FAA Docket No. 16-14-05, Director's Determination (Oct. 7, 2015), *aff'd*, Final Agency Decision (Aug. 4, 2016), *pet. for review dismissed*, 735 F. App'x 810 (4th Cir. 2018).

MOTION TO DISMISS STANDARD

Under C.R.C.P. 12(b)(6) "only a complaint that states a plausible claim for relief survives a motion to dismiss." *Warne v. Hall*, 2016 CO 50, ¶ 9 (June 27, 2016). Under that standard, a court must accept as true all of the factual allegations of the complaint, but not legal assertions or conclusions. *Paradine v. Goei*, 2018 COA 55,¶ 7 (Apr. 19, 2018) (quoting *Warne*). In order "[t]o survive a motion to dismiss for failure to state a claim, a plaintiff must allege a plausible claim for relief." *Ray v. People*, 2019 COA 24, ¶ 12 (Feb. 21, 2019); *see also Patterson v. James*, 2018

COA 173, ¶ 23 (Dec. 13, 2018) (plaintiff must "plausible grounds for relief, not merely speculative grounds").

ARGUMENT

Mile-Hi's complaint rests exclusively on its assertion that Longmont has violated several conditions contained in grant agreements between Longmont and the FAA. Mile-Hi does not allege violation of other federal law, state or local law, or contract. See Am. Compl. ¶¶ 29-47, 56-57. Indeed, the only relief Mile-Hi seeks is tied explicitly to the claims Mile-Hi has raised in its Part 16 complaint to the FAA based on asserted violations of the FAA grant conditions. Mile-Hi does not seek any damages or other relief arising under state law. Because the FAA and a U.S. Court of Appeals have the exclusive authority to enforce FAA grant conditions, the Court has no jurisdiction over Mile-Hi's claims. Further, Mile-Hi cannot state a claim upon which relief can be granted, because there is no private right of action to enforce FAA grant conditions. Finally, Mile-Hi's claim for declaratory judgment must be dismissed because it is premature and there is no ripe controversy.

I. THIS COURT DOES NOT HAVE JURISDICTION OVER CLAIMS ARISING UNDER FAA GRANT CONDITIONS.

Congress intended to vest authority for the enforcement of airport improvement grants "exclusively in the hands of the [FAA] through a comprehensive administrative enforcement scheme." *Friends of the E. Hampton Airport, Inc. v. Town of E. Hampton*, 152 F. Supp. 3d 90, 104 (E.D.N.Y. 2015), *aff'd in part, vacated in part on other grounds*, 841 F.3d 133 (2d Cir. 2016). As part of that enforcement scheme, Congress has mandated that only United States Courts of Appeals may review orders of the FAA, including orders regarding the enforcement of FAA grant conditions. 49 U.S.C. § 46110. Congress also provided FAA the tools to enforce the grants,

including the power to seek injunctions. 49 U.S.C. §§ 46105, 47111. Courts considering their ability to adjudicate alleged violations of FAA grant conditions hold that the FAA's Part 16 administrative enforcement process deprives state and federal district courts of jurisdiction over third-party claims of grant violations. As the U.S. Court of Appeals for the D.C. Circuit held, Section 46110 "preempt[s] the original jurisdiction of state courts as well as federal district courts." *City of Rochester v. Bond*, 603 F.2d 927, 934 (D.C. Cir. 1979) (dismissing challenge to FAA order in district court). Similarly, the court in *Ricks v. City of Winona*, 858 F. Supp. 2d 682, 688 (N.D. Miss. 2012) held that "this Court is not the proper forum for Plaintiff's claims that Defendants violated FAA's policies and procedures and the AAIA". In *Town of Fairview v. U.S. Dep't of Transp.*, 201 F. Supp. 2d 64, 70 (D.D.C. 2002), the court granted summary judgment on grant condition claims because the plaintiff had not completed the Part 16 process and because the district court would lack jurisdiction over any appeal.

Because Mile-Hi's claims in this case rest solely on alleged violations of Longmont's FAA grant conditions, the FAA and the appropriate Court of Appeals are the only forums with jurisdiction over those claims. This Court has no jurisdiction over Mile-Hi's claims, and the claims must be dismissed.

II. MILE-HI DOES NOT HAVE A PRIVATE RIGHT OF ACTION TO ENFORCE THE FAA'S GRANT CONDITIONS IN THIS COURT.

Even if the Court had jurisdiction, Mile-Hi's claims must be dismissed because the federal laws Mile-Hi seeks to enforce do not allow for private enforcement actions such as this. To determine whether a plaintiff can enforce a federal statute in state court, Colorado courts follow the federal test for assessing whether a federal statute creates a private right of action. *USA Tax Law Ctr., Inc. v. Office Warehouse Wholesale, L.L.C.*, 160 P.3d 428, 430 (Colo. App. 2007)

(applying test set forth in *Alexander v. Sandoval*, 532 U.S. 275 (2001)). Colorado courts look to other states and federal court decisions addressing the issue. *See id.* at 431.

Applying the federal standard, it is clear that Mile-Hi has no claim this Court can enforce. "Like substantive federal law itself, private rights of action to enforce federal law must be created by Congress." *Alexander*, 532 U.S. at 286; *see also Halliburton Co. v. Erica P. John Fund, Inc.*, 573 U.S. 258, 284-85 (2014) ("[T]he authority to fashion private remedies to enforce federal law belongs to Congress alone."). The search for congressional intent must be particularly exacting where, as here, a statute imposes conditions on Federal funding programs, because "the typical remedy for [] noncompliance with federally imposed conditions is not a private cause of action for noncompliance but rather action by the Federal Government to terminate funds . . . ." *Gonzaga Univ. v. Doe*, 536 U.S. 273, 280 (2002) (citations omitted). Accordingly, the United States Supreme Court has "made clear that unless Congress speaks with a clear voice, and manifests an unambiguous intent to confer individual rights, federal funding provisions provide no basis for private enforcement . . . ." *Id.* (internal quotations omitted).

With respect to the FAA grant conditions upon which Mile-Hi's claims are based, Congress vested authority for the enforcement "exclusively in the hands of the [FAA] through a comprehensive administrative enforcement scheme." *Friends of the E. Hampton Airport*, 152 F. Supp. 3d at 104. Specifically, "[t]he fact that § 47107 requires the various written assurances of nondiscrimination to be given to the Secretary of Transportation 'indicates that Congress intended to establish an administrative enforcement scheme' rather than a private right of action." *Four T's, Inc. v. Little Rock Mun. Airport Comm'n*, 108 F.3d 909, 916 (8th Cir. 1997) (quoting *Nw. Airlines, Inc. v. Cty. of Kent*, 955 F.2d 1054, 1058 (6th Cir. 1992)) (emphasis added). *See*

also Interface Group, Inc. v. Mass. Port Auth., 816 F.2d 9, 15 (1st Cir. 1987) ("[The AAIA] does not impose on airport developers a duty that arguably could run in favor of private plaintiffs. Rather, it imposes only the duty to give 'assurances' to 'the Secretary.'").[1]

Accordingly, courts have almost uniformly rejected any private right of action to enforce FAA grant conditions. *Bowling Green & Warren Cty. Airport Bd. v. Martin Land Dev. Co., Inc.*, 561 F.3d 556, 561 (6th Cir. 2009); *Four T's*, 108 F.3d at 915; *Nw. Airlines, Inc. v. Cty. of Kent*, 955 F.2d 1054, 1058–59 (6th Cir. 1992); *New England Legal Found. v. Mass. Port Auth.*, 883 F.2d 157, 168 (1st Cir. 1989); *Interface Group*, 816 F.2d at 15; *W. Airlines v. Port Auth. of N.Y. & N.J.*, 817 F.2d 222, 225 (2d Cir. 1987), *cert. denied*, 485 U.S. 1006 (1988); *Arrow Airways v. Dade Cty.*, 749 F.2d 1489, 1491 (11th Cir. 1985); *Hill Aircraft & Leasing Corp. v. Fulton Cty.*, 561 F. Supp. 667, 672 (N.D. Ga. 1982), *aff'd* 729 F.2d 1467 (11th Cir. 1984).

Because there is no private right of action to enforce the FAA grant conditions upon which Mile-Hi's claims depend, the complaint must be dismissed.

III. THIS COURT LACKS JURISDICTION TO AWARD INTERIM RELIEF BEFORE MILE-HI HAS EXHAUSTED ITS ADMINISTRATIVE REMEDIES.

Even if this Court did have jurisdiction to review Mile-Hi's claim that the City is violating the federal grant conditions, this Court lacks jurisdiction to issue an injunction because Mile-Hi has not exhausted its administrative remedies before the FAA. Under "exhaustion of remedies

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[1] Applying those principles, courts have also refused to adjudicate *indirect* claims based on the FAA grant conditions. For example, the grant conditions may not be enforced as regular contracts by persons claiming status as third-party beneficiaries. *Santa Monica Airport Ass'n v. Santa Monica*, 481 F. Supp. 927, 946 (C.D. Ca. 1979); *San Francisco v. W. Air Lines, Inc.*, 204 Cal. App. 2d 105, 125–26 (Cal. Ct. App. 1962). Similarly, courts have rejected using the FAA grant conditions to support a claim under 42 U.S.C. § 1983. *Aircraft Owners and Pilots Ass'n v. Hinson*, 102 F.3d 1421, 1424 (7th Cir. 1996) (finding no private right of action under the AAIA through Section 1983); *Four T's Inc.*, 108 F.3d at 916 (same); *New England Legal Found. v. Mass. Port Auth.*, 883 F.2d 157, 169-69 (1st Cir. 1989) (same); *Sw. Air Ambulance, Inc. v. City of Las Cruces*, 268 F.3d 1162, 1173-74 (10th Cir. 2001) (finding no private right of action under the Anti-Head Tax Act through Section 1983).

principles, courts will not review or grant relief in regard to any aspect of administrative proceedings until the agency has taken final action." *Envirotest Sys. v. Colo. Dep't of Revenue*, 109 P.3d 142, 143-44 (Colo. 2005) (citing *Colo. Health Facilities Review Council v. Dist. Court of Denver*, 689 P.2d 617, 621 (Colo. 1984)). "There are strong policy reasons for the exhaustion doctrine," including protecting "agency autonomy" and "conserv[ing] judicial resources by ensuring that courts only become involved with disputes when the administrative process fails to produce an adequate remedy." *Crow v. Penrose-St. Francis Healthcare Sys.*, 169 P.3d 158, 164-65 (Colo. 2007). "If a party fails to exhaust available remedies, courts lack subject-matter jurisdiction over the action in question." *Id.* (citing *City & Cty. of Denver v. United Air Lines, Inc.*, 8 P.3d 1206, 1212 (Colo. 2000)).

Applying those principles, the Colorado Supreme Court has held that a trial court may not issue an injunction to preserve the status quo based on the possible outcome of an administrative process. *Mountain States Tel. & Tel. Co. v. Pub. Utils. Com.*, 491 P.2d 582, 585-86 (Colo. 1971). As the Court explained, because administrative agencies are "vested with the authority, and presumably, [have] the expertise" to address subjects within their statutorily defined missions, "the sanction of any equitable relief, should properly be directed to the administrative agency" in the first instance, not the courts. *Id.* Accordingly, the preliminary injunction should have been denied because it would have "change[d] . . . the status quo of utility rates" and "dilute[d] the rate making prerogative of the PUC." *Id.*; *see also Acosta v. Jansen*, 499 P.2d 631, 633-34 (Colo. App. 1972) (upholding denial of preliminary injunction to block construction under yet-to-be-issued permit because "Plaintiffs cannot circumvent the necessity of exhausting their administrative remedies by filing a suit in anticipation of the issuance of a building permit"); *People ex rel. Winbourn v. Dist.*

Court Eighth Dist., 287 P. 849, 851 (Colo. 1930) ("When a statute provides a remedy . . . the party aggrieved must at his peril avail himself of this remedy and cannot resort to the courts in the first instance . . . nor invoke the equitable powers of the courts for redress.").[2]

Applying that law, Mile-Hi's claims must be dismissed. As the court in *Town of East Hampton* held in declining to issue a preliminary injunction to enforce FAA grant conditions: "Based on all of these elements of the AAIA, which place the responsibility of Grant Assurance compliance squarely with the Secretary, the Court finds that Congress at least implicitly precluded federal courts from exercising equity jurisdiction to enforce the AAIA's Grant Assurances." 152 F. Supp. 3d at 104; *see also Town of Fairview*, 201 F. Supp. 2d at 70 (dismissing claim of violation of FAA grant conditions because plaintiff had not exhausted its administrative remedies under Part 16).

Mile-Hi may seek to evade that rule by invoking only this Court's equitable authority to issue an injunction without asking the Court to adjudicate the merits of its Part 16 claims. But, like the claims in *Mountain States*, there is no basis for a preliminary injunction because Mile-Hi asks this court to issue an injunction based on Mile-Hi's hoped-for result *before* the FAA has ruled on the claims. Also like the claims in *Mountain States*, Mile-Hi seeks to *change* the status quo by

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[2] One former Justice of the Colorado Supreme Court once suggested that a trial court may issue a "status quo injunction" pending the outcome of an FAA Part 16 proceeding. *Arapahoe Cty. Pub. Airport Auth. v. Centennial Express Airlines, Inc.*, 956 P.2d 587, 599 (Colo. 1998) (Scott, J., concurring). That concurring opinion is not binding, however. Moreover, it is not a correct statement of the law. Justice Scott did not address *Mountain States* or *Acosta*. Instead, he relied on cases applying a specific statute authorizing a court to issue an injunction to preserve the status quo pending an arbitration. There is no similar statute authorizing and injunction pending an administrative process, and the Court in *Mountain States* expressly rejected such authority. 491 P.2d at 585. Finally, Justice Scott made that statement in support of an injunction to block aviation activity that violated existing *local law – i.e.*, to preserve the status quo under *existing* local law. Here, Mile-Hi seeks an injunction for the opposite purpose – to block enforcement of existing local law and roll-back local law to its 2017 status. On the facts as pled, even an outlier case like *Arapahoe County* does not support Mile-Hi's claim.

rolling back current Longmont rules to reinstate the pre-2017 permitting rules based on the outcome Mile-Hi *hopes for* from the FAA. Those are precisely the kinds of claims barred by *Mountain States, Town of East Hampton,* and *Town of Fairview,* and the exclusive federal process for enforcing FAA grant conditions.

Mile-Hi's claim is further improper because Mile-Hi asks this Court to impose relief that requires this Court to make a determination regarding the size and location of the PDZ at the Airport, a decision that rests in the primary and exclusive jurisdiction of the FAA and Longmont, as airport sponsor. The FAA has final authority over aviation safety, including skydiving operations. *See* Am. Compl. ¶ 34; *supra* at 5. The FAA requires that skydivers obtain an airport operator's permission to skydive at an airport. 14 C.F.R. § 105.23(b). The FAA has further authorized airport operators to designate PDZs on their airport. Advisory Circular 105-2E at 5-6 (Ex. 1). Indeed, the FAA has made clear that an airport operator *must* take affirmative action to address safety and operational problems at its airport to *avoid* being in violation of its grant conditions. *Skydive Myrtle Beach, Inc. v. Horry Cty. Dep't of Airports,* FAA Docket No. 16-14-05, Director's Determination (Oct. 7, 2015), *pet. for review dismissed,* 735 F. App'x 810 (4th Cir. 2018).

Pursuant to that authority, Longmont has instituted a permit process to approve skydiving operations and has designated a PDZ.[3] Also pursuant to the FAA's process, Mile-Hi has asked the FAA to review Longmont's decisions pursuant to Part 16, the prescribed process for such complaints. The FAA has exclusive authority to adjudicate that complaint, subject only to review

[3] Longmont has consulted with the FAA at every step of that process and, if necessary, can show a level of FAA review and lack of objection to the permitting process, permit fee, and PDZ design.

by a U.S. Court of Appeals, and issue any preliminary relief under 49 U.S.C. §§ 46105 & 47111. Any injunction by this Court would interfere with the FAA's investigation and decision in the pending Part 16 decision. Moreover, because Mile-Hi's injunction seeks to *change* the status quo, the injunction would necessarily interfere with Longmont's authority to design and establish a PDZ *and* interfere with the FAA's exclusive authority to review and decide issues of aviation safety, including the design of PDZs. An injunction would also interfere with Longmont's authority as Airport operator to impose reasonable fees for the use of the Airport and the FAA's primary jurisdiction to determine whether airport fees comply with FAA grant conditions.

Because Mile-Hi has not completed the Part 16 process and exhausted its administrative remedies, this Court lacks the jurisdiction to enter the interim relief Mile-Hi seeks and its claims must be dismissed.

IV. MILE-HI'S CLAIM FOR DECLARATORY JUDGMENT IS NOT JUSTICIABLE AND MUST BE DISMISSED FOR LACK OF CONTROVERSY

Mile-Hi seeks to evade the clear rule against private claims to enforce the FAA grant conditions by seeking a declaratory judgment as follows:

> Following determination by the [FAA], Mile-Hi Skydiving intends to bring the rulings of the FAA before this Court so the Court may enter declaratory judgment pursuant to C.R.C.P. 57 and C.R.S. 13-51-101 on the validity and enforceability of the City's ordinances and Airport Advisory Board directives as it pertains to Mile-Hi's skydiving operations. [Am. Compl. at ¶ 57].

This claim is both presumptuous and nonsensical on its face because, even assuming that the FAA will rule in Mile-Hi's favor, the FAA would have the authority to enforce its own order and there would be no role for this Court to play.

Moreover, the claim is premature, speculative, and not justiciable because it seeks a declaration regarding a decision the FAA has not made and the City's unknown response to that

future decision. Colorado courts look to the common jurisprudential doctrines of standing, mootness, and ripeness, to determine whether a case is justiciable. *Developmental Pathways v. Ritter*, 178 P.3d 524, 530–31 (Colo. 2008). The doctrine of ripeness "ensures that an issue is 'real, immediate, and fit for adjudication.'" *Id.* (quoting *Bd. of Dirs., Metro Wastewater Reclamation Dist. v. Nat'l Union Fire Ins. Co. of Pittsburgh, Pa.*, 105 P.3d 653, 656 (Colo. 2005)). Ripeness is an issue of subject matter jurisdiction and therefore may (and should) be raised in a motion under C.R.C.P. 12(b)(1). *See Timm v. Prudential Ins. Co.*, 259 P.3d 521, 528–29 (Colo. App. 2011) (accepting jurisdictional facts as true because defendant failed to assert its ripeness claim in a motion to dismiss for lack of subject matter jurisdiction).

A justiciable controversy exists in the context of a declaratory judgment action when "the facts alleged, under all the circumstances, show that there is a substantial controversy, between parties having adverse legal interests, of sufficient immediacy and reality to warrant the issuance of a declaratory judgment." *Am. Family Mut. Ins. Co. v. Bowser*, 779 P.2d 1376, 1380 (Colo. App. 1989) (citing *Maryland Casualty Co. v. Pac. Coal & Oil Co.*, 312 U.S. 270 (1941)). There must be "an existing state of facts concerning the legal rights of the parties that indicates threatened litigation in the immediate future." *Id.* (citation omitted). Colorado courts "will not consider uncertain or contingent future matters because the injury is speculative and may never occur." *Jessee v. Farmers Ins. Exch.*, 147 P.3d 56, 59 (Colo. 2006). "[C]ourts look to the hardship of the parties of withholding court consideration and the fitness of the issues for judicial decision." *Stell v. Boulder Cty. Dep't of Soc. Servs.*, 92 P.3d 910, 914–15 (Colo. 2004).

Here, there is no existing state of facts regarding the legal rights between Mile-Hi and the City over the FAA's decision for the simple reason *that the FAA's decision does not exist*. Because

it does not exist, no one knows what it will say, how it will (or will not) affect the parties, whether there will be any dispute about how to apply that decision, or whether there will be any need for judicial enforcement. There is no certainty regarding *anything* because the outcome of the Part 16 process is entirely contingent and unknown. Mile-Hi's claim is more than just speculative; it is imaginary.[4]

For example, the FAA may find no violation at all, making Mile-Hi's claim moot. The FAA may also find, as in *Skydive Myrtle Beach, Inc.*, *supra*, that Longmont is obligated to take steps to address safety issues created by Mile-Hi's unwillingness to comply with basic safety rules. Even if the FAA were to find a violation, Longmont may take appropriate corrective action in response making any intervention by this Court unnecessary, also making Mile-Hi's claims moot. In short, there is nothing for the Court to address or resolve now, and any future claim is entirely speculative and dependent on the outcome of many unforeseeable contingencies. It would be a waste of judicial resources, and a violation of the principles of justiciability and ripeness, for the Court to open a case now and clutter its docket on the remote possibility that it will be required to resolve a dispute at some point in the future.

CONCLUSION

For the reasons stated herein and because this Court lacks jurisdiction over Mile-Hi's claims, Longmont respectfully requests that the Court grant Longmont's Motion to Dismiss, with prejudice. Attached is a proposed order regarding this Motion to Dismiss.

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[4] Mile-Hi's claim regarding a permit for a "swoop pond" is also premature. Am. Compl. ¶ 27. The swoop pond permit is only in effect from May – September. Longmont is considering Mile-Hi's request for the 2019 permit, which includes addressing past non-compliance with fundamental safety requirements, but Longmont has not made any decision on Mile-Hi's request. It is premature for Mile-Hi to seek injunctive relief regarding a decision that has not been made.

Respectfully submitted on March 28, 2019.

/s/ *W. Eric Pilsk*

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CERTIFICATE OF SERVICE

I hereby certify that on March 28, 2019, a true and correct copy of the City of Longmont's Motion to Dismiss was served by e-filing through Colorado Courts E-Filing on all counsel appearing in this action.

/s/ *W. Eric Pilsk*
W. Eric Pilsk

Attorney for City of Longmont
Signed original on file at counsel's office pursuant to C.R.C.P. 121, § 1-26