DISTRICT COURT, COUNTY OF BOULDER, COLORADO Boulder County District Court Boulder County Justice Center 1777 6th Street Boulder, CO 80302	DATE FILED: September 3, 2015 12:33 PM FILING ID: 27817CB61401B CASE NUMBER: 2013CV31563
Plaintiff: CITIZENS FOR QUIET SKIES, INC., KIMBERLY GIBBS, TIMOTHY LIM, ROBERT YATES, SUZANNE WEBEL, JOHN BEHRENS, CARLA BEHRENS, and RICHARD DAUER **Defendants:** MILE-HI SKYDIVING CENTER, INC.	▲ **COURT USE ONLY** ▲ Case Number: **2013CV031563** Div. **2** Crtrm.: **Q**
Counsel for Defendant Anthony L. Leffert, #12375 Laura J. Ellenberger, #43931 Robinson Waters & O'Dorisio, P.C. 1099 18th Street, Suite 2600 Denver, CO 80202-1926 Telephone: 303-297-2600 Facsimile: 303-297-2750 E-mail: aleffert@rwolaw.com lellenberger@rwolaw.com	

DEFENDANT'S RESPONSE TO PLAINTIFFS' MOTION TO RECONSIDER AWARD OF ATTORNEY FEES

Defendant, Mile-Hi Skydiving Center, Inc. (“Mile-Hi”), by and through counsel Anthony L. Leffert of Robinson, Waters & O’Dorisio, P.C., hereby responds to the Plaintiffs' Motion to Reconsider Award of Attorney Fees ("Motion"), and states and alleges the following:

STANDARD FOR MOTION TO RECONSIDER

C.R.C.P. 59(a)(3) and (4) provide that a party may move for post-trial relief within 14 days of entry of judgment for an amendment of findings or an amendment of judgment. However, "[a] motion to reconsider is not specifically delineated in C.R.C.P. 59, and no other

rule or statute establishes a party's right to file such a motion," except in situations not relevant here. *Stone v. People*, 895 P.2d 1154, 1155 (Colo. App. 1995). Colorado courts "do not condone the prevalent use in trial courts of post-trial motions for reconsideration… Nevertheless, [they] recognize that [courts have], in the past, sometimes treated a post-trial motion to reconsider as a C.R.C.P. 59 motion to alter or amend findings or the judgment of the court." *Id*. at 1155-56.

"A motion for reconsideration is not a license for a losing party's attorney to get a second bite at the apple." *Shields v. Shetler*, 120 F.R.D. 123, 126 (D. Colo. 1988). Rule 59(a) motions "cannot be used to advance [new] arguments that could have been raised in prior briefing." *Grynberg v. Total S.A.*, 538 F.3d 1336, 1354 (10th Cir. 2008). These motions are "aimed at reconsideration, not initial consideration." *GSS Grp. Ltd. v. Nat'l Part Auth.*, 680 F.3d 805, 812 (D.C. Cir. 2012). Moreover, a motion to reconsider does not permit a party to rehash arguments that the Court has previously addressed. *Brown v. Presbyterian Healthcare Servs.*, 101 F.3d 1324, 1332 (10th Cir. 1996).

The Tenth Circuit Court of Appeals has explained:

> [Motions to reconsider] are inappropriate vehicles to reargue an issue previously addressed by the court when the motion merely advances new arguments, or supporting facts which were available at the time of the original motion. Absent extraordinary circumstances … the basis for the second motion must not have been available at the time the first motion was filed. **It is not appropriate to revisit issues already addressed or advance arguments that could have been raised in prior briefing.**

Servants of Paraclete v. Does, 204 F.3d 1005, 1012 (10th Cir. 2000) (emphasis added). Consequently, "the reconsideration of a judgment after its entry is an extraordinary remedy which should be used sparingly." 11 Wright, Miller and Kane, Federal Practice and Procedure § 2810.1 (2d ed. 1995), and cases cited in n. 13.

A trial court may reconsider and reverse a prior ruling if it determines that "its former ruling is no longer sound because of changed conditions, it needs to correct its previous ruling because of a legal or factual error, an intervening change in the law has occurred, or manifest injustice would result from its original ruling." *People v. Warren*, 55 P.3d 809, 813 (Colo. App. 2002). Absent such a showing, reconsideration is improper. Thus, a motion for reconsideration is appropriate only where "the court has misapprehended the facts, a party's position, or the controlling law." *Servants of the Paraclete,* 204 F.3d at 1012; *Gregg v. American Quasar Petroleum Co.*, 840 F.Supp. 1394, 1401 (D. Colo. 1993) ("A motion for reconsideration is proper when the court has patently misunderstood a party, has made a decision outside the adversarial issues presented, has made of mistake not of reasoning but of apprehension, or there has been a significant change or development in the law or facts since submission of the issues to the court.").

The principle that motions for reconsideration are an inappropriate mechanism to raise new arguments is a corollary of the concept that a party who fails to raise a timely objection waives the objection. *See, e.g., Highlands Ins. Co. v. Lewis Rail Service Co.*, 10 F.3d 1247, 1251 (7th Cir. 1993) (insured waived argument by "failing to raise argument until its motion to reconsider*"); U.S. v. All Funds on Deposit,* 2007 WL 2114670, *2 (E.D.N.Y. 2007) ("A party may not use a motion to reconsider as an opportunity to reargue the same points previously raised [or] to advance new arguments, which are deemed waived…"). This principle is well-established and has been embraced by Colorado courts in a variety of contexts, including in the context of issues first raised in a motion for reconsideration. *Denny Const., Inc. v. City and County of Denver ex rel. Board of Water Com'rs*, 170 P.3d 733, 740 (Colo. App. 2007) (and cases cited therein), *rev'd on other grounds*, 199 P.3d 742 (Colo. 2009). When a party does not

make a timely objection, it "has no basis to complain as to the amount of attorney fees awarded to [the other party]." *New Sheridan Hotel & Bar, Ltd. v. Commercial Leasing Corp., Inc.,* 645 P.2d 868, 869 (Colo. App. 1982); *see also In re Marriage of Tatum,* 653 P.2d 74, 77 (Colo. App. 1982) (same). This principle derives from both well-established law and the result of sound policy supported by the interests of finality for the parties and the conservation of judicial resources.

ARGUMENT

The arguments that the Plaintiffs raise for reconsideration they either previously raised and the Court denied or they failed to raise before this Court issued its Order re: Motion for Attorneys' Fees (the "Order"). Plaintiffs elected not to raise the majority of their objections before this Court's Order, and their belated attempt to do so now should be rejected. The arguments contained in Plaintiffs' Motion are in no way the product of new information, and there has been no change in the law. There are no issues, arguments, or evidence presented in the Plaintiffs' Motion that they could not have raised in response to Mile-Hi's Motion for Attorneys' Fees ("Motion for Fees"). Accordingly, the Plaintiffs have waived these arguments and objections. As the Court is aware, this case has been extensively litigated and much more expensive than it needed to be. The Plaintiffs' Motion to Reconsider is just another example of their improvident litigation tactics. As such, in addition to affirming the award of attorney fees the Court previously awarded, Mile-Hi requests an award of attorney fees and costs pursuant to C.R.S. § 13-17-102 incurred to prepare and file this Response to the Plaintiffs' Motion to Reconsider.

A. Award of Fees For Claims by Citizens for Quiet Skies (Inc.)

The Plaintiffs present no argument to demonstrate that the Court should reconsider its previous ruling awarding Mile-Hi's its attorneys' fees relating to claims asserted by Citizens for Quiet Skies, Inc. The Plaintiffs had every opportunity to raise these issues and make these arguments in their Response to Mile-Hi's Motion for Fees ("Response"), and they chose not to do so. In fact, the Plaintiffs did not address this category of requested fees at all in their Response. There has been no significant change or development in the law or facts. If the Plaintiffs objected to amount of fees Mile-Hi requested regarding Citizens' claims, they should have raised such objections in the prior briefing on this issue. Accordingly, the Plaintiffs' untimely objections are waived.

From the genesis of this litigation, Mile-Hi has been engaged in an ongoing battle with the Plaintiffs for them to adequately identify the party, "Citizens for Quiet Skies." Is "Citizens for Quiet Skies, ***Inc.***," a nonprofit corporation formed by Kim Gibbs to raise money to fund this litigation the named Plaintiff and real party in interest? Or is it "Citizens for Quiet Skies," a "group of Boulder County residents who are concerned about the negative noise impact to the community" allegedly caused by Mile-Hi's skydiving operations? *See* Second Amended Complaint at ¶ 1. The Plaintiffs have always maintained that this elusive party, "Citizens," has standing because it represents the interests of its members. Never before, until now, have the Plaintiffs alleged that Citizens is a separate legal entity.

It is a gross misstatement of the history of this case for the Plaintiffs to claim Mile-Hi's only conferral prior to seeking summary judgment regarding the claims asserted by Citizens was a single email. The issue of who exactly Citizens represented and what claims it brought on its own behalf or on behalf of its members was heavily litigated and discussed at length by the

Parties' counsel ever since Mile-Hi submitted its first Answer and Counterclaim in February of 2014. Additionally, months prior to undersigned counsel's email dated October 1, 2014, attached to Plaintiffs' Motion as Exhibit 1, Mile-Hi had propounded discovery requests and was forced to file a Motion to Compel regarding the identity of Citizens and its purported "members" because the Plaintiffs refused to identify them. *See* Defendant's Motion to Compel Discovery dated July 23, 2014. Mile-Hi argued that it was entitled to this information because Citizens had asserted claims for relief purportedly on behalf of these unidentified members. For months the Parties' counsel went back and forth on this issue. The Plaintiffs' contention that Mile-Hi did not meaningfully confer regarding its motion for summary judgment is as frivolous as Citizens' claims against Mile-Hi.

Despite full knowledge that Citizens does not own any property and the well-settled law that Citizens did not have standing to pursue monetary damages, in all three of the Plaintiffs' successive Complaints, Citizens, itself, asserted claims against Mile-Hi for monetary damages. While the Plaintiffs now claim that "[t]he organization only asserted the right to pursue the economic losses of the other Plaintiffs," that is not how the Complaints were drafted. Mile-Hi was forced to defend against these claims and file a motion for summary judgment in order to have all but one of them dismissed. Moreover, the Plaintiffs' own statement that Citizens' claims were asserted in order to pursue the economic losses of the Individual Plaintiffs demonstrates why the Individual Plaintiffs must be held jointly and severally liable for the fees Mile-Hi incurred in defending against substantially groundless and frivolous claims brought ostensibly "on their behalf."

The Court correctly awarded all of the fees Mile-Hi incurred to defend against Citizens' substantially frivolous and groundless claims, including for the drafting of a motion for summary

judgment on those claims and reply in support thereof. Mile-Hi has maintained since the beginning that the claims brought by Citizens were groundless, frivolous, and vexatious, as evidenced by Mile-Hi's counterclaim against Citizens for abuse of process alleging an ulterior purpose in naming Citizens as a Plaintiff. Even at that early procedural posture, it was apparent that Citizens claims lacked any factual or legal basis. This Court stated in its Order regarding Mile-Hi's attorneys' fees:

> The Court agrees with Defendant's assertion that Plaintiffs and Plaintiffs' counsel knew or reasonably should have known that Citizens did not own any real or personal property and thus had no standing to assert claims for damages at the time they filed each of their three complaints… Plaintiff had access to all Citizens' documents, as well as all legal authority, regarding this matter in advance of filing the claim. Plaintiff had the ability to determine the validity of Citizens claims prior to filing and also failed to withdraw the claims. The facts determinative of the validity of a Citizens claims were not reasonably in conflict. Further, Plaintiffs presented no rational argument based on the evidence or law in support of Citizens' claims for damages. The Court finds Citizens' claims for damages to be substantially frivolous and groundless and lacking any factual basis.

See Order re: Defendant's Motion for Attorneys' Fees at p. 7.

Furthermore, attorney fees awarded pursuant to C.R.S. § 13-17-102 are taxed as costs pursuant to C.R.C.P. 121 § 1-22(2)(a) and (c). "Although a trial court may allocate costs between various parties, it may also impose joint and several liability for such costs. The decision whether to allocate costs between parties or, instead, impose joint and several liability lies within the sound discretion of the trial court." *Hale v. Erickson*, 23 P.3d 1255, 128 (Colo. App. 2001) (internal citations omitted). The Individual Plaintiffs never before alleged that Citizens was a separate entity. Indeed, even now the Plaintiffs admit that all of Citizens' claims were brought on their behalf. It would be inequitable not to hold Citizens and the Individual Plaintiffs jointly and severally liable for the total fees Mile-Hi incurred in defending against the

substantially groundless and frivolous claims brought by Citizens on the Individual Plaintiffs' behalf. It is proper in the interest of justice to hold all of the Plaintiffs jointly and severally liable for the total award of attorney fees. Accordingly, the Court's Order should be affirmed.

B. Award of Fees Regarding Allegations of Physical and Mental Injuries.

First, counsel for Mile-Hi never agreed not to seek fees incurred for defending against the Plaintiffs' claims for damages for physical and mental injuries. As is apparent from the email chain attached to Plaintiffs' Motion as Exhibit 3, undersigned counsel's only reference to fees is the following:

> I will not stipulate to dismissing these claims - they are in your complaint and disclosures. You will need to file a motion to dismiss them. I will agree to language in my first response below. I will not seek fees ***for the dismissal***.

In fact, the Plaintiffs never filed the motion to dismiss referenced in counsel's email. Instead, they submitted a "Notice of Withdrawal of Damages for Medical Conditions," which is not the same and not what Mile-Hi's counsel would agree to. In addition, counsel's email states only that he would not seek fees for the dismissal of those damages claims, which does not include all of the fees incurred over several months of conducting discovery, taking depositions, filing motions, and scheduling hearings on this issue before the Plaintiffs finally "withdrew" these groundless damages claims.

Second, the $2,514.50 in fees that the Plaintiffs assert should not have been included in the total amount of awarded fees was inadvertently listed under the "Claims for Physical and Mental Injuries" section of Mile-Hi's attorney fee submission. *See* Exhibit 2 to Plaintiffs' Motion at p. 5. These four time entries for November 13, 14, and 25 should instead have been included in the "CQS Claims" section of Mile-Hi's fee calculation. Each of these disputed time entries pertain to drafting Mile-Hi's reply in support of the motion for summary judgment regarding

Citizens' claims. Since the Court awarded Mile-Hi 75% of the total fees incurred for defending against Citizens' claims, $1,885.88 (75% of $2,514.50) is the corrected amount of awardable fees for those time entries. If at all, Mile-Hi's total fee award should only be decreased by $628.63. This is, however, yet another objection that the Plaintiffs could have but failed to raise in their Response to Mile-Hi's Motion for Fees. Their objection is, therefore, waived. *See New Sheridan Hotel & Bar*, 645 P.2d at 869 ("Since no objection was timely made, the plaintiff has no basis to complain as to the amount of attorney fees awarded to defendant.").

The Plaintiffs have also waived any objection to the amount of fees the Court awarded with regard to the Plaintiffs' claims for damages for physical and mental injuries. This issue has been litigated and briefed *ad nauseam*. It is a misuse of a motion for reconsideration to rehash arguments that this Court has previously addressed and advance arguments that the Plaintiffs could have raised in prior briefing. The fact remains that the Plaintiffs knew from the outset they had not suffered any physical or mental injuries or incurred any medical expenses, and yet they waited over a year after filing their Complaint, "an unreasonable period of time," to withdraw these damages claims. *See* Order at p. 8. Mile-Hi was entitled to conduct discovery on these claims, which were included in all three of the Plaintiffs' successive Complaints, in order to defend against them. It is not for the Plaintiffs to determine, after the fact, how Mile-Hi should have prepared its defenses to these claims, nor are they the appropriate parties to decide how much time was reasonably or unreasonably devoted to defending against these claims.

Judge Gunning denied Mile-Hi's request for C.R.C.P. 35 Examinations of the Plaintiffs as premature at an early stage of the litigation, but the Plaintiffs knew before any complaint had been filed that they had not suffered damages for physical or mental injuries. *See* Order at p. 8 ("There is no evidence to support that any of the Plaintiffs suffered any mental or physical

injuries at the time the complaints were filed. Plaintiff had the ability to determine the validity of Plaintiffs claims for mental and physical injuries well in advance of the date it withdrew the claims.") Mile-Hi was not privy to the fact that the Plaintiffs had suffered no such injuries, and it should not be penalized for attempting to prepare a defense to the Plaintiffs' frivolous and groundless damages claims.

Plaintiffs contend they "did not, at any point, assert they had any medical injuries." See Plaintiffs' Motion at p. 5. To the contrary, all three of their Complaints contain specific claims for medical damages, including:

> a) Damages for past and future pain and suffering, annoyance, disturbance and discomfort, both temporary and permanent, and both **physical and mental**, caused by the acts of the Defendants;
>
> b) Damages for the Plaintiffs' past and future loss of enjoyment and life and the **medical expenses** incurred by the Plaintiffs; and
>
> c) Damages for **medical monitoring**;

See Complaint at p. 7; First Amended Complaint at p. 7; and Second Amended Complaint at p. 9.

The Plaintiffs have already argued their points on this issue, and the Court did not find them persuasive. The Court took into consideration Judge Gunning's orders and found that Judge Gunning recognized the C.R.C.P. 35 examinations Mile-Hi requested could, indeed, be warranted. *See* Order at p. 8. "It is not appropriate to revisit issues already addressed" in a motion to reconsider and is an inefficient use of the Court's judicial resources. *Servants of Paraclete*, 204 F.3d at 1012. This Court ruled:

> Plaintiffs' claims for damages relating to physical and mental injuries were both frivolous and groundless... By refusing to dismiss their groundless claims for mental and physical damages earlier in this litigation, Plaintiffs forced Defendant to incur legal

> fees to defend against them, and Defendant is therefore entitled to an award of attorneys' fees.

See Order at p. 8. Plaintiffs have presented no new arguments, law, or facts to demonstrate that the Court's decision should be modified in any way.

C. Award of Fees Regarding Unjust Enrichment and *Respondeat Superior*.

The Plaintiffs present nothing new for the Court to reconsider its award of fees regarding their unjust enrichment and *respondeat superior* claims. In their Response to Mile-Hi's Motion for Fees, the Plaintiffs incorrectly stated that Mile-Hi did not "substantively analyze the claim for unjust enrichment." In its Motion for Fees, Mile-Hi argued that the Plaintiffs added a claim for unjust enrichment in their Second Amended Complaint but failed to allege facts to show that the Plaintiffs conferred a benefit of any kind of Mile-Hi. The Court dismissed the Plaintiffs' unjust enrichment claim on summary judgment as there was no evidence to support it. *See* Order re: Defendant's Motion for Summary Judgment Regarding Plaintiffs' Remaining Claims at p. 7. Facts supporting a vital element to an unjust enrichment claim, that a benefit was conferred on the defendant by the plaintiff, were wholly absent. Plaintiffs present no reason why the Court should revisit this issue.

Similarly, the Plaintiffs have previously stated that they did not abandon their *respondeat superior* claim before trial. *See* Plaintiffs' Response to Mile-Hi's Motion for Fees at p. 2, n.1. The Court was not persuaded by this argument. Mile-Hi clearly sought fees related to this claim. *See* Motion for Fees at ¶¶ 8, 24, 28. The Plaintiffs chose to rebut Mile-Hi's straightforward request and reasoning with a mere footnote containing a conclusory statement that the Plaintiffs did not abandon this claim before trial. The Court has considered this argument before, denied its validity, and held that the Plaintiffs abandoned its *respondeat superior* claim only after this issue was fully briefed during the summary judgment stage of litigation.

The Plaintiffs had the ability and opportunity to object to the amount of fees Mile-Hi attributed to each of the Plaintiffs' claims, including for the unjust enrichment and *respondeat superior* claims. They chose not to raise this issue in previous briefing and have consequently waived any objections to these calculations. *See In re Marriage of Tatum*, 653 P.2d at 77 (Colo. App. 1982) (when a party does not make a timely objection to the amount of requested attorney fees, that party "cannot complain now about the reasonableness of those amounts"). Moreover, the space Mile-Hi devoted to these claims on summary judgment is not determinative of the fees incurred to defend against them. Mile-Hi made a good faith calculation and estimate of the fees devoted to these claims. *See Payan v. Nash Finch Co.*, 310 P.3d 212 (Colo. App. 2012) ("The essential goal in shifting fees is to do rough justice, not to achieve auditing perfection. So trial courts may take into account their overall sense of a suit, and may use estimates in calculating and allocating an attorney's time."). Accordingly, the award of $4,884.17 for fees incurred attributable to these claims should be confirmed.

D. The Boulder County Ordinance and Negligence *per se* Claim.

The Plaintiffs based their negligence *per se* claim on alleged violations of both the Boulder County Ordinance and a Longmont Municipal code. However, the Boulder County Ordinance includes an exception setting forth that the provision does not apply to the "operation of aircraft **or other activities which are subject to federal law with respect to noise control**." Boulder County Ordinance 92-28, Section 1.01.050(C) and (E) (emphasis added). The Court dismissed the negligence *per se* claim as is related to the Boulder County Ordinance on summary judgment and later held that this claim was substantially groundless and frivolous. The Court stated: "Based on the plain language of the Boulder County Ordinance, Plaintiffs' negligence per se claim with regard to this ordinance must fail because Boulder County specifically set forth an

exception that the noise ordinance at section 1.01.050 cannot be applied to aircrafts." *See* Order re: Defendant's Motion for Summary Judgment Regarding Preemption of State and Local Laws at p. 4.

Though the Court dismissed the claim based on the ordinance's exception for "the operation of aircraft," Mile-Hi also reasonably incurred fees for research related to the "or other activities which are subject to federal law with respect to noise control" clause of that exception. To thoroughly and sufficiently prepare its defense to the negligence *per se* claim and to address all possible defenses on summary judgment, it was necessary for Mile-Hi to research the applicability of this second portion of the Boulder Ordinance exception to determine the interplay between local and federal law regarding noise control. As the Court correctly held, the plain language of the Boulder County exception dictated that the claim be dismissed on that basis. However, in an abundance of caution Mile-Hi also argued that the claim should be dismissed on the basis of the "subject to federal law" provision and required research into the federal aviation noise laws and their preemptive effect of state and local laws. A cursory review of the ordinance would, indeed, have revealed to the Plaintiffs that Plaintiffs' counsel that the ordinance does not apply to the operation of aircraft, yet Mile-Hi was entitled to prepare a complete defense to this substantially groundless and frivolous claim. Accordingly, the Court's award of fees on this issue should be confirmed.

As with the Plaintiffs' other untimely objections to the amount of awarded fees, the Plaintiffs failed to raise this issue in previous briefing on this matter. Plaintiffs' counsel is clearly attempting to get a "second bite at the apple" on several arguments he failed to raise or ineffectively argued in previous briefing. *See Shields*, 120 F.RD. at 126 ("A motion for reconsideration is not a license for a losing party’s attorney to get a second bite at the apple.")

The Plaintiffs' untimely arguments regarding the amount of attorney fees attributable to the Boulder County Ordinance negligence *per se* claim have been waived and should be denied.

E. Depositions and Discovery Costs.

This case has been overly litigious and extremely expensive since the very beginning. An award of $7,994.25 for fees that Mile-Hi incurred to propound discovery to the Plaintiffs, take their depositions, and to battle over motions to compel so that Mile-Hi could adequately defend against the Plaintiffs' substantially groundless and frivolous claims is not unreasonable in light of the history and tone of these proceedings. Moreover, the Plaintiffs did not once address the fees Mile-Hi requested attributable to its deposition and discovery efforts in their Response to Mile-Hi's Motion for Fees. The arguments contained in the Plaintiffs' Motion to Reconsider are new issues that should have been raised in the briefing on Mile-Hi's Motion for Fees. The law is clear that a party may not use a motion to reconsider to raise new arguments. Because the Plaintiffs did not so much as mention the requested fees attributable to discovery and depositions in the prior briefing, they are barred from doing so now.

The Court held that Mile-Hi is entitled to an award for reasonable attorney fees with respect to: "(1) claims asserted by Citizens for Quiet Skies, Inc.; (2) claims for physical and mental injuries; (3) Plaintiffs' unjust enrichment claim; and (4) the negligence per se claim with regard to the Boulder County Noise Ordinance." Mile-Hi requested fees for propounding discovery requests and for conducting seven depositions of the several Plaintiffs to defend against these claims which the Court found to be substantially groundless and frivolous.

The Plaintiffs place a great deal of emphasis on the number and proportion of written interrogatory requests Defendant propounded on each issue. As the written interrogatory requests were not a substantial or prominent part of Mile-Hi's strategy in investigating and

collecting information regarding the Plaintiffs' claims, any such comparison presents a skewed view of the time and resources devoted to each of these issues. Thus, the Plaintiffs' arguments to the contrary are unavailing. With respect to the unjust enrichment claim, specifically, while only one written interrogatory was dedicated to this issue, Mile-Hi conducted seven depositions of the Individual Plaintiffs to gain information on how the Plaintiffs' believed they had conferred any benefit on Mile-Hi, an essential element to that claim.

With respect to the claims by Citizens, the Plaintiffs have misstated the history of this claim. The Court did not, as the Plaintiffs contend, dismiss Citizens' claims solely because it does not own property. Its claims were also dismissed because the Court found Citizens could not seek monetary damages on behalf of the Plaintiffs' or other undisclosed "members" because such damages required "individual proof of the injuries suffered by [each person.]." *See* Order re: Defendant's Motion for Summary Judgment Regarding Claims By Plaintiffs Citizens for Quiet Skies, Inc. at p. 4.

Moreover, Citizens joined the Individual Plaintiffs in asserting each claim for relief and claim for damages. Consequently, Mile-Hi was forced to engage in discovery efforts not only regarding Citizens' standing, but also as to the identity of its members on whose behalf it was claiming monetary damages, which claims the Court ultimately dismissed. It was not until after Mile-Hi had the opportunity to depose the Individual Plaintiffs that it became clear Citizens owned no property and could not maintain claims for monetary or physical damage to itself. *See id*.

Finally, the extent to which the Plaintiffs' alleged physical and mental injuries were litigated in this case is discussed at length above and in Mile-Hi's Motion for Fees. While this issue required a substantial amount of time and resources, it is not the "principle area where costs

may have been incurred" on the claims the Court found to be substantially groundless and frivolous. The nature and extent of Mile-Hi's discovery efforts and depositions were outlined in detail in the calculations attached to its Motion for Fees as Exhibit A to Exhibit 1. Considering the circumstances of this case, an award of half of Mile-Hi's fees incurred for discovery and deposition purposes is reasonable as the Court held that a substantial portion of the Plaintiffs' allegations were substantially groundless and frivolous.

CONCLUSION

The Plaintiffs' motion to reconsider improperly advances new arguments that it should have raised in prior briefing and also attempts to rehash arguments that the Court has previously denied at least once. "A motion for reconsideration is not a license for a losing party's attorney to get a second bite at the apple." *Shields*, 120 F.R.D. at 126. The Plaintiffs have not demonstrated any basis for the Court to reconsider its judgment, an "extraordinary remedy which should be used sparingly." 11 Wright, Miller and Kane, Federal Practice and Procedure § 2810.1 (2d ed. 1995). As such, the Court's Order re: Defendant's Motion for Attorneys' Fees should be confirmed in its entirety.

WHEREFORE, Defendant Mile-Hi Skydiving Center, Inc. prays this honorable Court will enter an order denying the Plaintiffs' Motion to Reconsider Award of Attorneys' Fees, and for such other and further relief as the Court shall deem just and proper.

Respectfully submitted this 3rd day of September, 2015.

ROBINSON WATERS & O'DORISIO, P.C.

s/Laura J. Ellenberger
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CERTIFICATE OF SERVICE

I hereby certify that on September 3, 2015, a true and correct copy of the foregoing **DEFENDANT'S RESPONSE TO PLAINTIFFS' MOTION TO RECONSIDER AWARD OF ATTORNEYS' FEES** was delivered via *ICCES*, addressed to the following:

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