DISTRICT COURT, COUNTY OF BOULDER, COLORADO **Boulder County District Court** **1777 6th Street, Boulder, Colorado 80302**	DATE FILED: September 10, 2015 8:23 PM FILING ID: 47D2B15C73779 CASE NUMBER: 2013CV31563
Plaintiffs: CITIZENS FOR QUIET SKIES**,** KIMBERLY GIBBS, TIMOTHY LIM, ROBERT YATES, SUZANNE WEBEL, JOHN BEHRENS, CARLA BEHRENS, and RICHARD DAUER **v.** **Defendant:** MILE-HI SKYDIVING CENTER, INC.	**▲COURT USE ONLY▲** **Case Number:** 2013CV031563
Randall M. Weiner, #23871 Annmarie Cording, #42524, Of Counsel **Law Offices of Randall M. Weiner, P.C.** 3100 Arapahoe Avenue, Suite 202 Boulder, Colorado 80303 Phone Number: 303-440-3321 Fax Number: 720-292-1687 randall@randallweiner.com acording@cordinglaw.com The Law Office of Matthew B. Osofsky, Esq. Matthew Osofsky, #34075 3100 Arapahoe Avenue, Suite 202 Boulder, Colorado 80303 Phone Number: 303-440-3321 mosofsky@live.com	

REPLY IN SUPPORT OF MOTION TO RECONSIDER AWARD OF ATTORNEY FEES

Plaintiffs, Citizens For Quiet Skies**,** Kimberly Gibbs, Timothy Lim, Suzanne Webel, John Behrens, Carla Behrens, and Richard Dauer, by and through counsel, The Law Office of Matthew B. Osofsky, Esq., hereby submit this Motion and in support thereof state:

ARGUMENT

I. STANDARD OF REVIEW

Defendant's brief states that "Colorado courts 'do not condone the prevalent use in trial courts of post-trial motions for reconsideration…'." Response at p. 2, *citing, Stone v. People*, 895 P.2d 1154, 1155 (Colo. App. 1995). However, the "…" represents critical deleted language. The actual quote is "We do not condone the prevalent use in trial courts of post-trial motions for reconsideration that are not mentioned in C.R.C.P. 59." Defendant admits that, "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." Plaintiffs Motion seeks relief directly described in the Rule and references these provisions.

In order to present a case for a narrow interpretation of C.R.C.P. 59, Defendant relies heavily on eight cases which analyze F.R.C.P. 59. *Shields v. Shetler*, 120 F.R.D. 123, 126 (D. Colo. 1988); *Grynberg v. Total S.A.*, 538 F.3d 1336, 1354 (10th Cir. 2008); *GSS Grp. Ltd. v. Nat'l Part Auth.*, 680 F.3d 805, 812 (D.C. Cir. 2012); *Brown v. Presbyterian Healthcare Servs.*, 101 F.3d 1324, 1332 (10th Cir. 1996); *Servants of Paraclete v. Does*, 204 F.3d 1005, 1012 (10th Cir. 2000); *Gregg v. American Quasar Petroleum Co.*, 840 F.Supp. 1394, 1401 (D. Colo. 1993); *Highlands Ins. Co. v. Lewis Rail Service Co.*, 10 F.3d 1247, 1251 (7th Cir. 1993); *U.S. v. All Funds on Deposit*, 2007 WL 2114670, *2 (E.D.N.Y. 2007). None of these cases mentions the Colorado rule and none of them cite law from Colorado state courts. No Colorado state court has ever cited any of these cases. In sum, they have no relevance to a Motion arising under C.R.C.P. 59.

The five Colorado state cases cited by the Defendant do not support its contention that Plaintiffs' Motion is precluded.

Only two of Defendant's Colorado state cases are on point. As discussed above, the *Stone* case merely states that Motions for Reconsiderations should be limited to the reasons set forth in C.R.C.P. 59. The case of *People v. Warren*, 55 P.3d 809, 813 (Colo. App. 2002) provides a general list of reasons for reconsidering and reversing a prior ruling which include, the need to correct the ruling "because of a legal or factual error, … or manifest injustice would result from its original ruling." Plaintiffs assert that their Motion for Reconsideration raises precisely these concerns.

The remaining three Colorado cases are completely inapposite. In *Denny Const., Inc. v. City and County of Denver ex rel. Board of Water Com'rs*, 170 P.3d 733, 740 (Colo. App. 2007) a party failed to raise an evidentiary objection during a jury trial, and it was found that the objection could not be raised for the first time in a Rule 59 Motion. Thus, the Rule 59 Motion effectively attempted to take a factual determination away from the jury. The fact that evidentiary objection must be preserved at trial does not provide any basis to conclude that this Court cannot revisit its own findings, particularly when it would not require the judicial economy concerns associated with repeating a hearing or trial. *See, UIH-SFCC Holdings, LP v. Brigato*, 51 P. 3d 1076 , 1078 (Colo.App. 2002) (finding that in a motion for reconsideration that did not seek a new trial, the trial court was not limited by any of the requirements of C.R.C.P. 59(d)).

The case of *New Sheridan Hotel & Bar, Ltd. v. Commercial Leasing Corp., Inc.*, 645 P.2d 868, 869 (Colo. App. 1982) does not involve Rule 59 at all. Attorney fees were awarded in that case pursuant to contract. By stipulation, counsel for the non-prevailing party agreed to enter objections to the amount of fees by a certain date and failed to do so. No Rule 59 Motion

was filed. The Court declined to hear the objections for the first time on appeal. The case of *In re Marriage of Tatum*, 653 P.2d 74, 77 (Colo. App. 1982) is substantially the same. The fact that the Court of Appeals would not revisit factual determinations when no objection was made to the trial court does not mean that this trial court should revisit and correct its own findings.

Plaintiffs' reliance of the Rule 59 motion for reconsideration was expressly approved by the Colorado Supreme Court. *See Jensen v. Runta*, 80 P.3d 906, 907 (Colo. App. 2003) (court review under Rule 59 of motion for reconsideration of a completed post-trial ruling on an attorney fees). In contrast, no Colorado case states that Plaintiffs arguments are inappropriate for a Rule 59 Motion.

Defendant's argument that this case was much more expensive than it needed to be is both true and irrelevant. Defendant seeks to shift much of the expense of the litigation to Plaintiffs, and Plaintiffs are entitled to now raise credible circumstances with the Court as to why it would be unfair for Defendant to obtain the amount of fees sought. Plaintiffs have not requested to revisit findings that claims were frivolous or groundless, and recognize that Defendant should be appropriately compensated under that ruling. However, the ruling is not a basis for a windfall for the Defendants or for a punitive award that exceed the actual injury. In the interest of substantive justice, Plaintiffs plead for the Court to consider the issues raised in the Motion and revise the award appropriately.

II. SPECIFIC ARGUMENTS

A. Claims by Citizens for Quiet Skies

Defendant contends that the Plaintiffs should be held jointly liable for the award concerning Citizens for Quiet Skies because the group advanced claims for damages on behalf of the Plaintiffs. The evidence in this matter was that most Plaintiffs had no decision making authority in the organization. They also advanced their own claims for damages. Thus, they did

not cause the organization to act and derived no benefit from its action. It would not be equitable to hold them responsible for the claims advanced by the organization. At most, Defendant's arguments might form a basis for extending the award to Kim Gibbs, but the remaining Plaintiffs did not cause the injury in any manner.

Also, Plaintiffs pointed out in their Motion that there was no meaningful conferral by Defendants on the issue of whether Citizens was entitled to economic damages, a subset of the larger issue of whether Citizens had standing to sue at all. As noted, the Court properly ruled that Citizens had standing to sue for injunctive relief. Had Mile-Hi engaged in the required conferral, neither party would not have had to brief this issue, since Plaintiffs were not seeking *any* additional damages beyond those sought by the individual Plaintiffs. Although Defendant complains that there was more than "a single email" discussing the economic claims asserted by Citizens, it fails to present any such discussions in their response. It is worth noting that when Mile-Hi unsuccessfully sought a directed verdict during trial by claiming that the Citizens' association of residents was hiding behind the corporation, the Court summarily rejected the argument.

Thus, because Plaintiff prevailed on its argument that CQS had standing to seek injunctive relief, and Defendant did not do much additional work with respect to the CQS claims for monetary damages, the award should at most equal $2,441.25, or roughly 75% of the amount the Defendant expended on the Reply Brief.

B. Physical and Mental Injuries.

Defendant states that "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 fails to note that the Magistrate Gunning stated this on September 23 and the entire issue was fully resolved by November 3.

The Court cannot reverse the findings of the magistrate and award time for discovery that was found to be "premature" or award fees incurred during the time when Defendants were specifically directed to wait on disclosures. Defendant had two weeks in which to challenge the Magistrates findings and did not do so. If they fail to do so, the rulings cannot be reversed. Colo.R.Mag. 7.

The Court noted that Magistrate Gunning held open the possibility of future discovery on medical damages. Therefore, Plaintiffs are concerned that the Court may have misapprehended that the fees being sought by Defendant were part of that future discovery. No future discovery occurred because the matter was resolved 41 days after the Magistrate issued his first order. As discussed in the Motion, the fees were almost entirely comprised of the efforts that were specifically found to be premature, or efforts during the time when Defendant was directed to await Plaintiffs' disclosures.

Defense counsels argues that his agreement to not "seek fees for the dismissal" of physical and mental injuries was not intend to waive the right to seek fees associated with discovery on this issue. This interpretation strains credibility. First, it is unclear what is meant by the statement that this waiver only indicated "he would not seek fees for the dismissal of those damages claims." Response at p. 8. Defendant says what it does not mean, but if "for the dismissal" is a limiting phrase, what is <u>included</u> within that description? Defendant incurred no fees for the Notice of Withdrawal file by Plaintiffs. In the context of C.R.C.P. 41(a), an agreement not to seek costs "for the dismissal" would naturally imply <u>all of the costs</u> associated with the claim; not merely the cost of the immediate filing.

Defendant's second position is that he agreed not to seek fees for a "dismissal," and not Plaintiffs' "withdrawal" of these claims. The argument is completely form over function.

Defendant received the substantive relief it requested in the agreement and did not complain as to the form of the Notice after the fact. Defendant should be held to its agreement.

C. Unjust Enrichment and Respondeat Superior

Defendant states that the Court should not revisit the finding that the claim for unjust enrichment was groundless. To the contrary, the decision hinged on the words "conveyed a benefit" from a 1997 case. *Dove Valley Bus. Park Assocs., Ltd. v. Bd. F Cnty. Comm'rs of Arapahoe Cnty.*, 945 P.2d 395, 403 (Colo. 1997). There was a change in the law in 2000. The most current case was an *en banc* decision of the Supreme Court which stated that, "a plaintiff seeking recovery for unjust enrichment must prove: (1) at plaintiff's expense (2) defendant received a benefit (3) under circumstances that would make it unjust for defendant to retain the benefit without paying." *Salzman v. Bachrach*, 996 P. 2d 1263, 1266 (Colo. 2000). The phrase "conveyed" was eliminated from the law in favor of broader language that fit Plaintiffs' theory on this claim. This Court should not maintain a ruling that misapprehends the law regardless of what has brought the parties to this point.

Defendant did not respond to the substance of the argument that it dedicated less than 5% of the relevant brief to unjust enrichment, or the contention that any award should be less than 10% of the cost of the brief, at most. Defendant simply contends that Plaintiffs waived the argument, but no Colorado state cases support this assertion. Colorado law places paramount importance on substantive justice. Since, Plaintiffs' substantive position that unjust enrichment represents less than 10% of the time into the brief is uncontested, the interest of substantive justice should prevail and the award should reflect only the actual injury.

Defendant states that the Court should not revisit the award regarding Respondeat Superior because Plaintiffs previously argued that the claim was not abandoned. Plaintiffs

Motion for Reconsideration did not request that the Court revisit that issue. Plaintiffs noted that there was no finding that the claim was groundless. Furthermore, evidence was presented to indicate it was not groundless, regardless of whether it was abandoned. Moreover, there are no fees that were incurred on this issue. Defendant did not respond to the substance of these arguments. Defendant should not receive the windfall of an award unless (a) there is a finding of groundlessness, and (b) they actually spent discrete time on the claim.

D. Boulder County Ordinance

Defendant contends that Mile-Hi's federal preemption argument was prompted by a line in the Boulder County Ordinance regarding federal laws, and that "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." Response at p. 13.

With due respect to opposing counsel, the argument is disingenuous and misses the point. Plaintiffs' principal point was that all of the federal research was necessary for the challenge to the Longmont Ordinance. Since Defendant clarified that it was not seeking fees for time spent challenging the Longmont Ordinance, research related to that issue should not be awarded. While Defendant states that motivation for the research also came from the language in the Boulder Ordinance, Defendant notably does not challenge the position that all of the research was also necessary for the failed challenge to the Longmont Ordinance.

E. Depositions and Discovery Costs

Plaintiffs contend that Defendant did not spend half of its discovery on the issues which are subject to the fee award. Defendant argues that the award of half of its discovery costs is reasonable because of the case has been "overly litigious and expensive from the beginning." In

effect, Defendant contends that it deserves punitive amount above and beyond its actual fees incurred on the discrete issues.

Analyzing the actual discrete time spent on these issues in discovery forms the best basis for an award. The award should not include time for "conveying a benefit" because that is not actually an element of unjust enrichment under the most current statement of the law. *Salzman*, 996 P. 2d at 1266. Regardless, the one to three questions asked of each witness regarding "conveying" would not significantly raise the percent of deposition time spent on the issues subject to the fee award. Plaintiffs' demonstrated that no more than 15% of written discovery was dedicated to these matters and less than 8% of the time in depositions. Defendant's argument that more time was spent in Depositions does not raise the overall percentage of time above 15%. Thus, 15% is a figure that is conservative in Defendant's favor.

WHEREFORE, Plaintiffs request that the Court issue an Order as described above and in the form attached hereto.

Respectfully submitted this 10th day of September, 2015.

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CERTIFICATE OF SERVICE

I, the undersigned, hereby certify that a copy of the foregoing was E-Served by the Court-authorized E-System provider to all active counsel of record on ICCES' service list on this 10th day of September, 2015:

/s/ Matthew Osofsky
Matthew Osofsky

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