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| District Court, Boulder County, State of Colorado 1777 Sixth Street, Boulder, Colorado 80302 (303) 441-3744 | |
| <p>Plaintiff: CITIZENS FOR QUIET SKIES, KIMBERLY GIBBS, TIMOTHY LIM, ROBERT YATES, SUZANNE WEBEL, JOHN BEHRENS, CARLA BEHRENS, and RICHARD DAUER</p> <p>v.</p> <p>Defendants: MILE-HI SKYDIVING CENTER, INC.</p> | <p style="text-align: right;">DATE FILED: July 28, 2015 11:37 AM CASE NUMBER: 2013CV31563</p> <p style="text-align: center;">▲ COURT USE ONLY ▲</p> |
| <p><i>Attorneys for Plaintiff:</i> Randall M. Weiner and Annmarie Cording</p> <p><i>Attorneys for Defendants:</i> Anthony L. Leffert and Laura J. Ellenberger</p> | <p>Case Number: 2013CV31563 Division 2 Courtroom Q</p> |
| <p>ORDER RE: DEFENDANT'S MOTION FOR ATTORNEYS' FEES</p> | |

This Matter comes before the Court on Defendant’s June 11, 2015 Motion for Attorneys’ Fees. Plaintiffs filed a Response on June 25, 2015, to which Defendant filed a Reply on July 1, 2015. Having considered the file, pleadings, and applicable case law, the Court finds and rules as follows:

I. BACKGROUND

This case surrounds a skydiving company, Defendant Mile-Hi Skydiving Center, Inc., (“Defendant”) that operates sky diving planes mostly inside a geographical “flight box” of detailed latitudes and longitudes, and specifically relates to the level of noise and intensity of vibrations from Defendant’s airplanes. The Plaintiffs, Citizens for Quiet Skies, Inc. (“Citizens”) and seven individuals, (“Plaintiffs”) allegedly suffered from sleep disturbances, stress anxiety, and headaches, and have seen their property values decrease. As a result, Plaintiffs initiated a suit against Defendant alleging negligence, trespass, nuisance, negligence per se, respondeat superior, equitable relief, and unjust enrichment. Plaintiffs subsequently withdrew their claims for mental or physical injuries and any damages for mental or physical injuries including medical expenses, past and future on November 3, 2014.

On October 7, 2014, Defendant filed a Motion for Summary Judgment regarding Claims by Citizens for Quiet Skies, Inc. The Court found Citizens did not own any real or personal property, and therefore had not incurred any damages. Accordingly, the Court entered an order

on November 24, 2014 granting Defendant's Motion for Summary Judgment regarding all of Citizens claims with the exception of the claim for injunctive relief.

In the December 31, 2014 Order Re: Defendant's Motion for Summary Judgment Regarding Preemption of State and Local Laws, the Court granted the Motion as to the Boulder County Ordinance negligence per se claim, but denied the Motion as to the Longmont Municipal Code negligence per se claim. Accordingly, Plaintiffs' negligence per se claim remained only with regard to the Longmont Municipal Code.

Defendant filed a Motion for Summary Judgment Regarding Plaintiffs' Remaining Claims on November 13, 2014 in which Defendant requested summary judgment on Plaintiffs' claims for trespass, nuisance, negligence, respondeat superior, equitable relief, and unjust enrichment. The Court entered an Order Re: Defendant's Motion for Summary Judgment Regarding Plaintiff's Remaining Claims on January 5, 2015. The Court granted Defendant's Motion in part, dismissing Plaintiff's trespass and unjust enrichment claims. Subsequently, the Court denied summary judgment with regards to Plaintiff's nuisance, negligence, respondeat superior, and equitable relief claims, which proceeded to trial.

Defendant filed a Motion for Attorneys' Fees on June 11, 2015, requesting the Court enter an order awarding attorneys' fees in its favor in the amount of \$58,420.74 on grounds that it had to defend against Plaintiffs' substantially groundless and/or frivolous claims. Defendant seeks attorneys' fees with respect to the claims that were either dismissed by the Court on summary judgment motions or withdrawn by Plaintiffs in an untimely manner. These claims include: (1) claims asserted by Citizens; (2) claims for physical and mental injuries; (3) claims for trespass; (4) Plaintiff's unjust enrichment claim; and (5) Plaintiff's negligence per se claim with regard to the Boulder County Noise Ordinance. Defendant does not seek attorneys' fees on any of the claims that proceeded to trial.

Plaintiffs filed a Response on June 25, 2015, requesting the Court deny Defendant's Motion for Attorneys' Fees. After the aforementioned proceedings, Plaintiffs filed their Notice of Appeal on July 9, 2015. Plaintiff's appeal is currently pending, and the Court has yet to rule on Defendant's Motion for Attorneys' Fees.

II. STANDARD OF REVIEW

A. Attorneys' Fees

"Colorado follows the American rule under which a party cannot recover his or her legal fees." *Double Oak Cons., L.L.C. v. Cornerstone Development Intern., L.L.C.*, 97 P.3d 140, 150 (Colo. App. 2003). "Section 13-17-101, et seq., is an exception to the American Rule." *Id.*

§ 13-17-102, C.R.S., provides:

- (1) Subject to the provisions of this section, in any civil action of any nature commenced or appealed in any court of record in this state, the court may

award, except as this article otherwise provides, as part of its judgment and in addition to any costs otherwise assessed, reasonable attorney fees.

(2) Subject to the limitations set forth elsewhere in this article, in any civil action of any nature commenced or appealed in any court of record in this state, the court shall award, by way of judgment or separate order, reasonable attorney fees against any attorney or party who has brought or defended a civil action, either in whole or in part, that the court determines *lacked substantial justification*.

§ 13-17-102, C.R.S. (emphasis added).

A claim lacks substantial justification if it is “substantially frivolous, substantially groundless, or substantially vexatious.” § 13-17-102(4), C.R.S. A court must find that a claim or defense was substantially frivolous, substantially groundless, or substantially vexatious in order to award attorney fees under § 13-17-102, C.R.S. *Shaw v. Baesemann*, 773 P.2d 609, 611 (Colo. App. 1988). A claim or defense is frivolous if the proponent can present no rational argument based on the evidence or law in support of that claim or defense. *W. United Realty, Inc. v. Isaacs*, 679 P.2d 1063, 1069 (Colo. 1984).

A claim or defense is groundless if the allegations of the complaint, while sufficient to survive a motion to dismiss for failure to state a claim, are not supported by any credible evidence at trial. *Id.* Further, “[a] losing position does not necessarily justify an award of attorney fees under § 13-17-102.” *McCormick v. Bradley*, 870 P.2d 599, 607-08 (Colo. App. 1993). “The decision to award attorney fees on the basis that a claim lacks substantial justification is committed to the sound discretion of the trial court.” *Board of Com’rs, County of Boulder v. Eason*, 976 P.2d 271, 273 (Colo. App. 1998). The trial court’s ruling “will not be disturbed on appeal if the ruling is supported by the evidence.” *Colorado Supply Co., Inc. v. Stewart*, 797 P.2d 1303, 1307 (Colo. App. 1990).

Further, § 13-17-103, C.R.S., provides a list of factors the Court is to consider in determining whether or not to award attorneys’ fees.

(1) In determining the amount of an attorney fee award, the court shall exercise its sound discretion. When granting an award of attorney fees, the court shall specifically set forth the reasons for said award and shall consider the following factors, *among others*, in determining whether to assess attorney fees and the amount of attorney fees to be assessed against any offending attorney or party:

(a) The extent of any effort made to determine the validity of any action or claim before said action or claim was asserted;

(b) The extent of any effort made after the commencement of an action to reduce the number of claims or defenses being asserted or to dismiss claims or defenses found not to be valid within an action;

- (c) The availability of facts to assist a party in determining the validity of a claim or defense;
- (d) The relative financial positions of the parties involved;
- (e) Whether or not the action was prosecuted or defended, in whole or in part, in bad faith;
- (f) Whether or not issues of fact determinative of the validity of a party's claim or defense were reasonably in conflict;
- (g) The extent to which the party prevailed with respect to the amount of and number of claims in controversy;
- (h) The amount and conditions of any offer of judgment or settlement as related to the amount and conditions of the ultimate relief granted by the court.

§ 13-17-103, C.R.S. (emphasis added).

III. ARGUMENTS

A. Defendant's Argument

Defendant argues it is entitled to reasonable attorneys' fees it incurred in this litigation because a number of Plaintiffs' claims were substantially groundless and/or substantially frivolous. Specifically, Defendant argues the claims asserted by Citizens, the claims for physical and mental injuries, the claims for trespass, Plaintiff's unjust enrichment claim, and the negligence per se claim with regard to the Boulder County Noise Ordinance were all substantially groundless and/or substantially frivolous.

Defendant argues Plaintiffs and their attorneys knew or reasonably should have known these claims for relief and claims for damages lacked substantial justification since they were legally frivolous and/or lacked any factual basis. Defendant clarifies it is not seeking attorneys' fees for any claims that went to trial, only the aforementioned five claims which were either dismissed on summary judgment or withdrawn by Plaintiffs after an unreasonable period of time. Defendant asserts these claims were brought by Plaintiffs in bad faith and were "intended to make this case as difficult and expensive as possible." In sum, Defendant argues it is entitled to an award of attorneys' fees in the amount of \$58,420.74.

B. Plaintiffs' Argument

Plaintiffs request the Court deny Defendant's Motion for Attorneys' Fees because Plaintiffs were making good faith efforts to include all potentially applicable legal theories, and they were entitled to raise any claim for which there is simply a "rational argument." Plaintiffs assert they made rational arguments for each of their claims and in doing so should not be sanctioned by awarding Defendant attorneys' fees. Plaintiffs further argue there was a legitimate dispute regarding the law surrounding Plaintiffs' trespass and unjust enrichment claims, and they were "entitled to argue in good faith for a different interpretation of the law." Plaintiffs believe Defendant's Motion for Attorneys' Fees is a "venting of the hostilities felt by Defense counsel towards Plaintiffs' counsel" and Defendant should therefore not be awarded any attorneys' fees.

IV. ANALYSIS

A. Jurisdiction of the Trial Court

At the outset, the Court finds it retains jurisdiction to rule on Defendant's Motion for Attorneys' Fees, despite the fact the judgment has since been appealed. A decision on the merits is a final judgment for appeal purposes despite any outstanding issue of attorney fees. *Baldwin v. Bright Mortg. Co.*, 757 P.2d 1072, 1074 (Colo. 1988). "If judgment has been entered and only the issue of attorney fees remains to be determined, certification pursuant to C.R.C.P. 54(b) is not a prerequisite to appellate review of the merits of the case." *Id.*; see also *Kennedy v. Gillam Dev. Corp.*, 80 P.3d 927, 929 (Colo. App. 2003) ("an award of attorney fees is distinct and separately appealable from the judgment on the merits").

While the *Baldwin* holding addressed only the issue of finality of the merits judgment for purposes of appeal, "that decision also impliedly addressed the related issue of whether the trial court continued to have jurisdiction to determine attorney fee issues after a notice of appeal is filed to review the merits judgment." *Koontz v. Rosener*, 787 P.2d 192, 198 (Colo. App. 1989). Thus, while attorney fee issues are not within the purview of C.R.C.P. 59, "the trial court retains jurisdiction to determine such motions during the pendency of the merits appeal." *Id.*; see also, *A. Tenenbaum & Co., Inc. v. Colantuno*, 3 P.3d 456, 457 (Colo. App. 1999) ("A trial court has continuing jurisdiction to determine attorney fee issues after a notice of appeal is filed to review the merits judgment."), *aff'd*, 23 P.3d 708 (Colo. 2001).

Despite the language of C.A.R. 4, the issue of attorney fees is not within the scope of C.R.C.P. 59. Rule 4 of the Colorado Appellate Rules provides:

The trial court shall continue to have jurisdiction to hear and decide a motion under C.R.C.P. 59 regardless of the filing of a notice of appeal, provided the C.R.C.P. 59 motion is timely filed under C.R.C.P. 59(a) and determined within the time specified in C.R.C.P. 59(j).

C.A.R. 4 (emphasis added).

Nevertheless, the trial court still retains jurisdiction to rule on the issue of attorney fees, despite the fact that a party has appealed the trial court's judgment. *Koontz*, 787 P.2d at 198. "Attorney fee issues are not within the purview of C.R.C.P. 59, and that the trial court retains jurisdiction to determine such motions during the pendency of the merits appeal." *Id.* While the trial court has jurisdiction to award attorney fees during the pendency of the appeal, the Court notes that the trial court may not award attorney fees for a party's initial appeal, absent direction to do so by the appellate court. *Sullivan v. Lutz*, 827 P.2d 626 (Colo. App. 1992). "[A]ttorney fees incurred in an appeal may be awarded under the statute only by the court in which the appeal is brought." *Id.* at 629.

In the present action, Defendant filed a Motion for Attorneys' Fees on June 11, 2015. Plaintiffs filed their Notice of Appeal on July 9, 2015. Though the trial court has yet to issue an order regarding Defendant's Motion for Attorney Fees, the trial court retains jurisdiction to determine motions on attorney fee issues even though the merits of the judgment are pending appeal. *Koontz*, 787 P.2d at 198. In ruling on Defendant's Motion for Attorney Fees, the Court only rules on attorney fees incurred prior to or as a result of the trial. The Court does not make any ruling with regards to fees that may be incurred upon appeal. Having established that the Court retains jurisdiction to rule on Defendant's Motion for Attorneys' Fees, the Court will analyze each of Defendant's claim for attorneys' fees in turn.

B. *Claims for Relief by Citizens for Quiet Skies, Inc.*

Defendant argues it is entitled to attorneys' fees for defending claims by Citizens. Defendant asserts the claims asserted for damages by Citizens lacked substantial justification, were legally frivolous and factually groundless. Defendant sets forth it incurred legal fees by defending these claims, engaging in discovery efforts regarding whether Citizens had standing to bring these claims, filing a Motion to Compel Discovery, responding to a Motion for Protective Order and in the preparation and filing of the Motion for Summary Judgment which was granted by the Court. In their Response, Plaintiffs did not attempt to argue the claims brought by Citizens did not lack substantial justification, nor did Plaintiffs specifically respond to Defendant's request for attorneys' fees with regards to the claims raised by Citizens.

Defendant argues "[f]ailure of a responding party to file a responsive brief may be considered a confession of the motion." § 1-15(3), C.R.C.P. While ordinarily true, an award of attorney fees under § 13-17-102, C.R.S., cannot be held to be confessed by failure to respond to a motion pursuant to C.R.C.P. 121. *Artes-Roy v. Lyman*, 833 P.2d 62 (Colo. App. 1992). Nevertheless, when considering the lack of response by Plaintiffs as well as the factors set out in § 13-17-102, C.R.S., the Court finds Defendant is entitled to an award of attorneys' fees with regard to the claims by Citizens.

"An association has standing to bring suit on behalf of its members when: (a) its members would otherwise have standing to sue in their own right; (b) the interests it seeks to protect are germane to the organization's purpose; and (c) neither the claim asserted, nor the relief requested, requires the participation of individual members in the lawsuit." *Conestoga Pines Homeowners' Ass'n, Inc. v. Black*, 689 P.2d 1176, 1177 (Colo. App. 1984) (quoting *Hunt*

v. Wash. State Apple Adver. Comm'n, 432 U.S. 333 (1977)). Further, when damages are sought and the injuries suffered are distinct for each individual member of an organization, “both the fact and extent of injury would require individualized proof.” *Warth v. Seldin*, 422 U.S. 490, 515-16 (1975); *see also Conn. State Dental Ass’n v. Anthem Health Plans, Inc.*, 591 F.3d 1337, 1354 (11th Cir. 2009) (“Damage claims are incompatible with associational standing because such claims usually require ‘individualized proof.’”).

In the Court’s November 24, 2014 Order Re: Defendant’s Motion for Summary Judgment, the Court found Citizens was not seeking damages for itself, but rather, was seeking alleged damages to its members, which the Court found required individualized proof. The Court explained that Citizens could not seek damages on behalf of its members as Citizen had no standing to seek damages on behalf of it. Citizens owned no real or personal property and therefore had not incurred any damages. The Court stated that because Citizens’ members must be joined by individual plaintiffs in this matter, Citizens could not bring claims for damages on behalf of its members. Subsequently, the Court dismissed Citizens’ negligence, negligence per se, and trespass claims.

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. A claim for damages by an organization that has neither real nor personal property, yet has members capable of bringing individualized claims, cannot be supported by any credible evidence, and is therefore groundless. *See Isaacs*, 679 P.2d at 1069. 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. Defendant is entitled to reasonable attorneys’ fees for the claims for relief by Citizens.

C. Plaintiffs’ claims for damages relating to physical and mental injuries

Defendant argues that at the time all of the complaints were filed, Plaintiffs and Plaintiffs’ counsel knew or reasonably should have known that none of the Plaintiffs had incurred any physical or mental injuries and had not incurred any medical expenses for such mental or physical injuries. Plaintiff responds by stating that until the date they withdrew these claims, they were actively seeking to limit the proceedings by clarifying these claims. Yet, Plaintiffs are the only party that would have complete access to any physical or mental injuries they suffered and the amount of any health care costs related thereto. Thus, the Court finds Defendant’s argument persuasive, and awards Defendant reasonable attorneys’ fees with respect to Plaintiffs’ claim for damages relating to physical and mental injuries.

Throughout the course of this litigation Plaintiffs filed three complaints. The initial complaint was filed on October 29, 2013, the First Amended Complaint was filed on November 22, 2013, and the Second Amended Complaint was filed on February 12, 2014. Each complaint contained Plaintiffs' claims for damages relating to physical and mental injuries. It was not until November 3, 2014, over a year after the filing of the initial complaint, that Plaintiffs eventually filed a Notice of Withdrawal of Damages for Medical Conditions. Before filing this Notice, Plaintiffs failed to disclose information or evidence of the alleged mental and/or physical damages they purportedly suffered, despite the repeated requests of Defendant.

Both parties are correct that Defendant's Motion for C.R.C.P. 35 Examinations of Plaintiffs was denied as not being ripe at the time filed. However, the Court specifically stated, "[a]s the case progresses and additional disclosures are made, including expert disclosures, C.R.C.P. 35 examinations may be warranted." *See* Order re: Defendant's Motion for C.R.C.P. 35 Examinations of Plaintiffs at p. 3.

Plaintiffs waited over a year after filing their Complaint, an unreasonable period of time to withdraw these claims, during which they failed to disclose to Defendant any evidence in support of these claims. The Court concludes Plaintiffs' claims for damages relating to physical and mental injuries were both frivolous and groundless. *See Isaacs*, 679 P.2d at 1069.

Plaintiff had access to all Plaintiffs medical records regarding this claim in advance of filing the claim. 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. The facts determinative of the validity of a Plaintiffs medical and physical injuries were not reasonably in conflict. Further, Plaintiffs presented no evidence that they had experienced any physical or mental injuries as a result of Defendant's conduct. 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.

D. *Plaintiffs' claims of trespass*

Defendant argues Plaintiffs, and Plaintiffs' counsel, knew or reasonably should have known that trespass requires a physical intrusion upon the property of another and that noise is an intangible intrusion that can only give rise to trespass if the aggrieved party is able to prove physical damage to their property caused by the intangible intrusion. *See Public Service Company of Colorado v. Van Wyk*, 27 P.3d 377 (Colo. 2001). In response, Plaintiffs argue though they did not experience "structural damage" to their properties, vibrations themselves should be considered physical damages. Plaintiffs assert there was a legitimate dispute regarding the law, specifically with regards to the damage requirement and whether or not noise is tangible. Plaintiffs assert further they were "entitled to argue in good faith for a different interpretation of the law." Response at ¶ 6.

Trespass is “the physical intrusion upon property of another without the permission of the person lawfully entitled to the possession of the real estate.” *Lawrence v. Buena Vista Sanitation Dist.*, 989 P.2d 254, 255-56 (Colo. App. 1999). The intrusion may occur by an individual intentionally entering land owned by another or by an individual causing something else to enter the land owned by another, such as by placing a thing on or beneath the surface of the land. *Hoery v. U.S.*, 64 P.3d 214, 217 (Colo. 2003). An intangible intrusion may give rise to a trespass claim “only if an aggrieved party is able to prove physical damage to the property caused by such intangible intrusion.” *Pub. Serv. Co. of Colo. v. Van Wyk*, 27 P.3d 377, 390 (Colo. 2001). In Colorado, it is well settled that noise, despite being perceptible through hearing, is impalpable, and thus, intangible. *Id.* at 387.

Plaintiffs’ asserted their trespass claim could include diminution of market value, cost for restoration and loss of use of the property, as well as discomfort and annoyance to the property owner or occupant. Two Plaintiffs asserted the noise physically vibrates in their homes and one Plaintiff asserted the windows shook in her home.

In the present case, there was no physical damage to the Plaintiffs’ property. In fact, the individual Plaintiffs whose depositions were provided to the Court with the pleadings in this matter stated no physical damage had occurred to their property or they do not know what physical damage they may have incurred. *See* Gibbs Dep., Ex. B at 165: 12-17; 178:14-18; Lim Dep., Ex. C at 61:25-62:9; J. Behrens Dep., Ex. D at 40:5-12; C. Behrens Dep., Ex. E at 51:17-52:2; Yates Dep., Ex. F at 45:8-46:6; Webel Dep., Ex. G at 62:15-63:6; Dauer Dep., Ex. H at 90:19-91:10. In its January 5, 2015 Order Re: Defendant’s Motion for Summary Judgment on Plaintiffs’ Remaining Claims, the Court dismissed Plaintiffs’ trespass claims on grounds that Plaintiffs failed to show any physical damage to their property.

Plaintiffs assert they argued in good faith for a different interpretation or extension of the current Colorado law regarding trespass. Though the Court did not concur with Plaintiffs’ interpretation nor find the argument for extension of the law to be well founded, based on the arguments asserted the Court cannot find Plaintiffs’ trespass claims were frivolous or groundless. Plaintiffs’ argument that vibrations to a home or shaking of windows would constitute physical damage is sufficient to demonstrate a valid argument for a different interpretation of the law and thus it withstands a finding of frivolous or groundless litigation. Therefore, the Court denies Defendant’s claim for attorneys’ fees on Plaintiffs’ trespass claim.

E. *Plaintiffs’ claims of unjust enrichment*

Defendant argues that there were no facts alleged by Plaintiffs which would support a claim for unjust enrichment. In response, Plaintiffs contend the issue of unjust enrichment came down to a legal dispute regarding the meaning of the term “conferred,” and Plaintiffs were entitled to make a good faith argument for a more expansive interpretation of the term. Plaintiffs claim their effort to assert the claim in good faith should not be penalized by awarding Defendant attorneys’ fees. Considering the arguments of both parties and the evidence presented, the Court agrees with Defendant and finds Plaintiffs’ claims of unjust enrichment lacked substantial justification.

A party is unjustly enriched when that party benefits at the unfair costs to another party. *Lewis v. Lewis*, 189 P.3d 1134, 1141 (Colo. 2008). A party claiming unjust enrichment must prove (1) that a benefit was conferred on the defendant by the plaintiff, (2) that the benefit was appreciated by the defendant, and (3) that the benefit was accepted by the defendant under such circumstances that it would be inequitable for it to be retained without payment.” *Dove Valley Bus. Park Assocs., Ltd. V. Bd. F Cnty. Comm’rs of Arapahoe Cnty.*, 945 P.2d 395, 403 (Colo. 1997). Unjust enrichment is a form of relief in quasi-contract or contract implied in law intended to undo the benefit to one party that comes at the unfair detriment of another. *Sterenbuch v. Goss*, 266 P.3d 428, 437 (Colo. App. 2011). A “benefit” is any form of advantage, and one confers a benefit where he or she saves the other from expense. *Bachrach v. Salzman*, 981 P.2d 219, 222 (Colo. App. 1999). Further, Black’s Law Dictionary defines the term “confer” as “[t]o grant (something) as a gift, benefit, or honor.” CONFER, Black’s Law Dictionary (10th ed. 2014).

In its Order from January 5, 2015, the Court found Plaintiffs had not “conferred the claimed benefit upon Defendant; only that Plaintiffs allegedly suffered because of Defendant’s activities, which may have resulted in a financial benefit to Defendant.” Order Re: Defendant’s Motion for Summary Judgment on Plaintiffs’ Remaining Claims at p. 7. The Court found that although Plaintiffs may suffer in some capacity from Defendant’s activity while Defendant benefits from such activity, this does not equate to Plaintiffs conferring the benefit upon Defendant. The Court found there was no evidence or factual basis to support the allegation that Plaintiffs conferred a benefit on Defendant, a required element for any unjust enrichment claim.

While Plaintiffs argued for a more expansive interpretation of the term “conferred,” this term is both clear and well-defined with regards to unjust enrichment as granting a benefit. By no stretch of the definition of “conferred” could this Court find the Plaintiffs had conferred a benefit on the Defendant.

Further, the expansive definition of the term “conferred” that Plaintiff sought the Court to adopt would violate public policy. Such a conclusion would open the floodgates for countless claims to be brought on meager grounds that a correlation exists between a plaintiff’s suffering and a defendant’s benefit. Plaintiff was entitled to argue for an expansive definition of this term. However, Plaintiffs or Plaintiffs’ counsel knew or reasonably should have known such an argument for an expansive definition of the term, in the fashion in which Plaintiff sought it, was frivolous and lacked substantial justification.

Accordingly, because there were no facts to support Plaintiffs’ claim for unjust enrichment, and because Plaintiffs argument for an expansion of unjust enrichment was not meritorious nor within a reasonable interpretation of the word “conferred”, the Court finds Plaintiffs’ claim for unjust enrichment lacked substantial justification and was factually groundless. Defendant is entitled to its reasonable attorneys’ fees incurred to defend against this claim.

F. *Plaintiffs' claims for negligence per se – violation of the Boulder County Noise Ordinance*

Finally, Defendant argues it is entitled to reasonable attorneys' fees and costs for the defense of Plaintiffs' negligence per se claim with respect to the Boulder County Ordinance. In response, Plaintiffs appear to misconstrue for which claim Defendant seeks attorneys' fees. Plaintiff states "the fact Defendant eventually prevailed on this issue is not a basis for sanctions." Plaintiff also states "though the Court eventually concluded that the Longmont Code was not applicable to aircraft noise, Plaintiffs' position was not frivolous or groundless." Plaintiffs contend there is no indication Plaintiff's position on the ordinance was asserted in bad faith.

Defendant clarifies it is not seeking any fees attributable to defending against the negligence per se claim with respect to the Longmont Municipal Code, which proceeded to trial. Rather, Defendants seek attorneys' fees only for the negligence per se claim with respect to the Boulder County Noise Ordinance. Defendant asserts the language of the ordinance sets forth an exception for the operation of an aircraft or other activities which are subject to federal law with respect to noise control, and a cursory review of the ordinance would have revealed to Plaintiffs and Plaintiffs' counsel that the ordinance does not apply to the operation of aircrafts. The Court agrees and finds Defendant is entitled to reasonable attorneys' fees and costs for the defense of Plaintiffs' negligence per se claim with respect to the Boulder County Ordinance.

On December 31, 2014, the Court issued an Order dismissing Plaintiffs' negligence per se claim with respect to the Boulder County Ordinance. The Court found the Boulder County Ordinance includes an exception setting forth that the provision in section 1.01.050 does not apply to "operation of aircraft or other activities which are subject to federal law with respect to noise control." 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. For this reason, the Court concluded Defendant's aircraft operations cannot be found to violate section 1.01.050 of the Boulder County Ordinance.

Plaintiffs' negligence per se claim with respect to the Boulder County Noise Ordinance was substantially frivolous and factually groundless. The plain language of this ordinance is both clear and unambiguous, and the Court agrees with Defendant that even a cursory review of the Boulder County Noise Ordinance would have revealed to Plaintiffs and Plaintiffs' counsel that the ordinance does not apply to the operation of an aircraft. Plaintiff had the ability to determine the validity of this claim prior to filing the claim. Nevertheless, Plaintiffs brought and maintained their claim for violation of the ordinance, requiring Defendant to incur legal costs and fees to conduct discovery, legal research, and prepare and file a Motion for Summary Judgment as to this claim. The facts determinative of the validity of a Plaintiffs claim were not reasonably in conflict.

The Court finds Defendant is entitled to an award of reasonable attorneys' fees with respect to Plaintiff's negligence per se claim with respect to the Boulder County Noise Ordinance.

In sum, the Court finds that Defendant is entitled to an award of reasonable attorneys' 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. Defendant is not entitled to an award of attorneys' fees for the claim of trespass. The Court now determines the reasonableness of the attorneys' fees requested by Defendant.

G. Reasonableness of Attorneys' Fees

Defendant requests the Court award a total of \$58,420.74 in attorneys' fees. Defendant asserts this amount represents the reasonable and necessary attorneys' fees incurred to defend against Plaintiffs' substantially groundless and/or frivolous claims. Defendant clarifies, however, that this value only represents the fees incurred to defend against the groundless and/or frivolous claims at issue, and it is not requesting any fees incurred for trial of the remaining claims. In their Response, Plaintiffs do not contest the reasonableness of Defendant's requested attorneys' fee award. The Court finds Defendant's request for \$58,420.74 in attorneys' fees, less the amount claimed for the trespass claim and an adjustment for discovery/depositions as set forth below, to be reasonable, and therefore awards Defendant an award of attorneys' fees in the amount of \$47,984.41

In awarding attorney fees, the trial court may consider, among other circumstances, the amount in controversy, the length of time required to represent the client effectively, the complexity of the case, the value of the legal services to the client, and awards in similar cases. *Hartman v. Freedman*, 591 P.2d 1318 (1979). Other factors may also be considered, and the weight given to any one factor depends on the circumstances of the case. *Beeson v. Indus. Claim Appeals Office*, 942 P.2d 1314 (Colo. App. 1997). The initial estimate by the court of a reasonable attorney fee is reached by calculation of the "lodestar" amount. This amount represents the number of hours reasonably expended multiplied by a reasonable hourly rate and carries with it a strong presumption of reasonableness. *Spensieri v. Farmers Alliance Mut. Ins. Co.*, 804 P.2d 268 (Colo. App. 1990). Once the lodestar amount is determined, that basic amount may be adjusted upward or downward by application of the factors listed above, together with the degree of success achieved and those factors set forth in the Colorado Rules of Professional Conduct Rule 1.5. *Tallitsch v. Child Support Servs.*, 926 P.2d 143, 147 (Colo. App. 1996).

With respect to the claims made by Citizens for Quiet Skies, Inc., Defendant incurred a total of \$16,971.50 to defend against those claims. The Court entered summary judgment with regard to three of the four claims brought by Citizens. Thus, the Court finds it is reasonable to award Defendant $\frac{3}{4}$ of the fees it incurred in defending against Citizens' claims, or a total of \$12,728.62. With respect to Plaintiffs' claims relating to physical and mental injuries, Defendant incurred \$10,363.50 to defend against those claims. Defendant argues and the Court finds it is Defendant is entitled to attorneys' fees in that amount. With respect to Plaintiffs' claims for trespass, unjust enrichment, respondeat superior, nuisance, negligence, and equitable relief, Defendant incurred a total of \$14,625.50 to defend against those claims. While three of these claims went to trial, the claims for trespass, unjust enrichment, and respondeat superior were either dismissed by the Court or abandoned by Plaintiffs. Defendant argues it is therefore entitled to attorneys' fees in half of this amount, a total of \$7,326.25. However, since the Court

finds Defendant is not entitled to attorneys' fees for defending against Plaintiffs' trespass claim, Defendant is only entitled to an award of attorneys' fees for the unjust enrichment and respondeat superior claims. Thus, the Court finds Defendant is entitled to 2/3 of its requested \$7,326.25, a total of \$4,884.17. With respect to Plaintiffs' claim for negligence per se with regard to both the Boulder County Noise Ordinance and the Longmont Noise Ordinance, Defendant incurred legal fees in the amount of \$24,027.75. Since only the claim with regard to the Boulder County Noise Ordinance was found to lack substantial justification, Defendant argues and the Court finds it is entitled attorneys' fees in half this amount, a total of \$12,013.87. Finally, Defendant incurred \$15,988.50 to propound discovery to Plaintiffs' and to take Plaintiffs' depositions. The Court finds it reasonable to award Defendants one half of this sum, \$7,994.25, as the discovery and depositions would have addressed other matters related to trial. In sum, Defendant incurred a total of \$47,984.41, and is entitled to reasonable attorneys' fees in this amount.

The Court has reviewed the Defendants accounting of attorney fees provided at Exhibit A to its Motion. The Court finds these values represent the reasonable lodestar amounts of Defendant's attorney's fees. *See* Ex. A to Def.'s Mot. for Attorneys' Fees. In its previous Order Re: Affidavit of Anthony Leffert in Support of Award of Attorneys' Fees dated April 22, 2015, the Court held the rates and fees charged by Defendants' counsel are reasonable given the skill and experience level of Defendants' attorneys when compared with the customary rates for attorneys in this geographical area. For the reasons set forth therein the Court maintains its finding of the reasonableness of the rates charged by Defendants' counsel. Additionally, the amount in controversy, the length of time required to represent the client effectively, the complexity of the case, the value of the legal services to the client, and awards in similar cases are all factors that favor Defendant's request in this Order. *See Tallitsch*, 926 P.2d at 147. This case involved complex data, numerous experts, was heavily litigated in motions practice, had multiple parties, and was a high conflict case with high stakes.

Defendant's attorneys' fees, or lodestar amounts, are reasonable given the skill and experience level of Defendants' attorneys and when compared with the customary rates for attorneys in this geographical area, and the fact Plaintiffs failed to contest or dispute the reasonableness of Defendant's requested attorneys' fees, the Court finds Defendant's requested attorneys' fees to be reasonable, and orders Plaintiff pay Defendant's counsel the amount of \$47,984.41.

V. CONCLUSION

The Court hereby **GRANTS** Defendant's June 11, 2015 Motion for Attorneys' Fees. Plaintiff is hereby ordered to pay Defendant's counsel **\$47,984.41** within 30 days of this Order. Defendant's counsel may enforce this Order in its own name.

DATED: 7/28/15

BY THE COURT

Judith L. LaBuda

Judith L. LaBuda
District Court Judge