DISTRICT COURT, COUNTY OF BOULDER, COLORADO **Boulder County District Court** **1777 6th Street, Boulder, Colorado 80302**	DATE FILED: August 13, 2015 11:10 PM FILING ID: 73A0D65A2C501 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	

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, Law Offices of Randall M. Weiner, P.C. and The Law Office of Matthew B. Osofsky, Esq., hereby submit this Motion and in support thereof state:

1. A judgment was entered on July 30, 2015 awarding the Defendant $47,984.41 in attorney fees. Plaintiffs request clarification and reconsideration of the award, pursuant to C.R.C.P. 59(a)(3)&(4). Plaintiffs specifically request:

a. Clarification that the award pertaining to claims by Citizens for Quiet Skies (CQS) is entered as against only CQS.

b. A reduction in the overall award to $7,204.05 or less.

2. The Court made specific awards and Plaintiffs request adjustments as follows:

i. Award for Claims asserted by CQS: $12,728.62. Plaintiffs seek an order reducing this amount to no more than $2,441.25.

ii. Award for claims for medical injuries: $10,363.50. Plaintiffs seek an order reducing this amount to $0.

iii. Award for unjust enrichment and respondeat superior claims: $4,884.17. Plaintiffs seek an order reducing this amount to between $732.62 and $1,462.55.

iv. Award for claims associated with the Boulder County Noise Ordinance: $12,013.87. Plaintiffs seek an order reducing this amount to no more than $1,000.00.

v. Award for discovery costs: $7,994.25. Plaintiffs seek an order reducing this amount to $2,300.00 or less.

3. Plaintiffs request the above changes in the interest of substantive justice for the reasons stated below.

ARGUMENT

A. Claims by Citizens for Quiet Skies

The Court has awarded $12,728.62 as ¾ of the overall briefing costs on the motion for the dismissal of claims advanced by Citizens for Quiet Skies, reasoning that the Defendant prevailed on three out of four claims advanced. Plaintiffs request that(1) the award be clarified as a sanction against CQS only, and (2) the award be reduced to $2,441.25 representing the time spent on ¾ of the Reply brief by Defendants on this issue.

There is no basis to charge other Plaintiffs with responsibility for the actions of CQS. The organization is a separate legal person from the other Plaintiffs. Defendants have not asserted any basis for vicarious liability or veil piercing. Thus, an award with respect to the actions of CQS can only be entered as against CQS.

As the sanctioned party, CQS requests a reduction based upon the lack of a meaningful conferral on this issue. The only conferral from the Defendant prior to seeking summary judgment was a single sentence indicating the intent to challenge all claims by CQS. See **Exhibit 1**. As the Court has noted, the Defendant was not successful in obtaining a dismissal of all of the claims by CQS. Thus, CQS was correct to indicate opposition to the Motion.

The principle issue in dispute with respect to CQS was whether the organization had standing to assert claims on behalf of its members. The Defendant contended that CQS had no standing. The Court concluded that it did have standing with respect to the request for injunctive relief but not for claims asserting monetary damages.

CQS' ability to pursue monetary damages was not significant to the overall case by Plaintiffs. The loss of CQS's independent right to seek those damages had no functional effect on the proceedings. The organization only asserted the right to pursue the economic losses of the other Plaintiffs. Those claims for damages proceeded to trial.

A meaningful conferral regarding the issue of CQS pursuing monetary damages would have likely resulted in a stipulation that CQS would not seek monetary damages. Plaintiffs' would have conceded the issue because it would not have involved sacrificing any of the monetary damages asserted in the case. CQS recognizes that it defended its right to seek monetary damages in its Response Brief, and accordingly recognizes that an award for time spent on the Reply[1] may be appropriate (assuming arguendo that any sanction is appropriate). However, the Response should not be taken as an indication that counsel for CQS would have been unreasonable upon a meaningful conferral about the specific objections to the claims by CQS. Once a Motion was filed, the standing issue needed to be argued and Plaintiff did so successfully with respect to injunctive relief. Monetary damage was merely a component of the overall argument.

In the alternative, Plaintiff CQS requests that the Court consider the differential cost to the Defendant to address monetary damages. Stated differently, the Court should consider whether the Defendant would have done any less work if the monetary damage issue had been conceded in advance. Defendant would still have challenged the organizational standing of CQS to seek injunctive relief, and the briefing would have involved the exact same issues. Thus, Defendant did not do any additional work with respect to claims for monetary damages. Awarding Defendant ¾ of the cost of its brief when it would have incurred substantially the same costs to brief the issue on which it lost is an unfair windfall to the Defendant.

Based upon either of the above, the award should be no more than $2,441.25.

B. Physical and Mental Injuries.

With respect to Plaintiffs' claims relating to physical and mental injuries, the Court concluded that the Plaintiffs' Complaints contained a request for medical damages and that Plaintiffs were late in withdrawing it.

First, in a recent review of the conferral between counsel on Defendant's demand for the Notice of Dismissal, undersigned counsel discovered that Mr. Leffert reached an agreement with Mr. Weiner which should have precluded any request for fees on this matter. Defense counsel agreed in the correspondence that if the Notice of Dismissal was filed, "I will not seek fees for

[1] A total of $3,255.00 was spent on the Reply Brief. See Defendants time entries at p. 3 (highlighted), attached as **Exhibit 2**.

the dismissal." See **Exhibit 3** at p. 3 (highlighted). Defendant should be bound by this agreement.

Defendants also included as part of their $10,363.50 total on this matter $2,514.50 for time spent from October 13-25, 2014 on another matter. See **Exhibit 2** at p.5 (highlighted). This amount must be removed from any award regarding physical or mental injuries.

The Court should also decline to award time associated with a request for medical exams that was found to be premature before discovery as to whether Plaintiffs were even asserting medical injuries. See Order of Magistrate Gunning on September 23, 2014. All of the time entries prior to September 23 associated with this issue relate to the premature effort to obtain medical exams. See **Exhibit 2** at p.4. Time for these premature efforts before September 23 ($1,555.50) should not be awarded.

Furthermore, time associated with seeking medical exams from September 23 to October 29 should likewise be excluded from any award based on Magistrate Gunning's orders. After a October 7 follow-up conference, Magistrate Gunning noted that the discovery was in progress with responses regarding medical conditions due on October 29, 2014. See Minute Order dated 10-9-15. The Order of October 9 stated that, "[f]ollowing Plaintiffs' production of discovery responses and any supplemental disclosures, Defendant shall identify proposed physician(s) and/or examiner(s) for C.R.C.P. 35." (emphasis added). The time entries from October show that the Defendant did not wait on discovery responses, per the Magistrates Order. See **Exhibit 2** at pp. 4-5. Instead, Defendant unreasonably incurred time before the October 29 discovery responses were due on an issue that was ultimately fully resolved by November 3, 2014.

The remaining time spent on this issue pertained to Plaintiffs agreement to a Notice of Dismissal ($520.00) and withdrawal of the premature Motion for medical exams ($242.00).

Furthermore, the award should be vacated because this Court's finding regarding the meaning of the requests for physical and mental suffering in the Complaints directly conflicts with the law of the case as set forth by Magistrate Gunning on September 23, 2014 when he denied Defendant's request for medical exams. The Court correctly noted that the Magistrate left open the possibility of medical examinations down the road. However, the reason that he found the request premature was because he specifically found that the Complaints did not state a claim for medical damages. He stated:

> The Motion is premised entirely on allegations in the Second Amended Complaint. (Motion, ¶ 1). No showing has been made that Plaintiffs are seeking to recover damages for specific medical expenses, or that they are in fact pursuing damages for physical and mental conditions.

See Order of Magistrate Gunning on September 23, 2014 (emphasis added). The issue of whether the request for physical and mental suffering in Plaintiffs' Complaints was an assertion of medical injuries, was directly and extensively litigated in the briefs to Magistrate Gunning. The Magistrate directly and unequivocally concluded that the statement in the Complaints were not assertions of medical injuries.

This Court has now concluded the opposite by stating, "Plaintiff had access to all Plaintiffs medical records regarding this claim in advance of filing the claim." As the Magistrate concluded, no such claim for medical injuries was ever actually filed in this action. Plaintiffs "Notice of Withdrawal" was filed to mollify Defendant when it was repeatedly insisted that Plaintiffs were asserting a claim they were never, in fact, pursuing. The correspondence between counsel makes it clear that Plaintiffs did not, at any point, assert that they had medical injuries. See **Exhibit 3**.

Accordingly, Plaintiffs request that the award of fees in the amount of $10,363.50 be withdrawn.

C. Unjust Enrichment and Respondeat Superior

Plaintiffs request that the Court reduce the award for time spent on claims for unjust enrichment and respondeat superior.

First, the Court did not find that the claim for Respondeat Superior lacked substantial justification. To the contrary, the claim survived summary judgment. The Court characterizes the claim as "abandoned," which Plaintiffs dispute, but there is no basis to conclude that the claim was either frivolous or groundless. The Order denying summary judgment established that the claim was not legally frivolous. Nor can it be regarded as groundless. The evidence at trial was that the Defendant's planes were flown by its agents. Plaintiffs clearly sought to hold Defendant vicariously liable for those acts. Thus, the evidence showed a factual basis for the claim regardless of whether the claim was advanced at trial as a formal separate claim. Moreover, there has been no showing that any fees were incurred with respect to claims for respondeat superior, other than those spent on the failed portion of the Motion on this issue. Since only nuisance was found to lack substantial justification, Plaintiffs assert that Defendant should receive at most 1/3 of the fees ($2,442.08) sought regarding trespass, unjust enrichment and respondeat superior.

Furthermore, Plaintiffs request that the Court consider the volume of space dedicated to each issue in the Motion for Summary Judgment. Defendant did not keep records to specifically identify the time spent on each of the six issues addressed in its Motion for Summary Judgment. Therefore, it attributed equal time to each issue. The Brief indicates that this is not an appropriate way to allocate the cost of drafting. The Brief was twenty pages long and the section on unjust enrichment consisted of a single page (5%) with two legal citations. The first ten pages are "undisputed facts," none of which pertain to unjust enrichment. The second ten pages contains the legal arguments, and less than one page (<10%) of the space is dedicated to unjust enrichment. Thus, the issue represents between 5% and 10% of the time spent on the Brief overall ($14,625.50), and any award should be limited to between $732.62 and $1,462.55.

D. Boulder County Ordinance

On Plaintiffs' claim for negligence per se with regard to both the Boulder County Noise Ordinance and the Longmont Noise Ordinance, Defendant argued that it was entitled to ½ of the briefing costs on its federal preemption arguments because claims regarding one of the two ordinances were dismissed. Dividing the time in this manner is arbitrary in view of the issues

briefed, and does not reasonably estimate the actual time spent on obtaining dismissal of the Boulder County Ordinance claims.

The Motion on this issue was eleven pages, of which ten pages dealt with preemption. However, Defendant did not prevail based upon its preemption arguments. In fact, the preemption argument specifically failed at this juncture of the case. Defendant prevailed on the Boulder County Ordinance based upon a specific exemption in the ordinance. Only one paragraph of the brief dealt with the exemption in the ordinance. See MSJ filed 10-27-14 at p. 10. Moreover, Defendant stated that a "minimum amount of legal research would have revealed this clear exemption from the Boulder County ordinance." Id. Thus, the Brief itself indicates there were no substantial legal research expenses on this matter.

In summary, a minimal amount of the overall time spent on Defendant's Brief was actually spent on the prevailing argument. Defendant clarified that it was not seeking fees for time spent challenging the Longmont Ordinance. The award by the Court effectively pays Defendant for time spent challenging the Longmont Ordinance. Only the differential time spent on the Boulder County Ordinance issue should be awarded and that time should be no greater than a few hours to read the ordinance and draft the single paragraph on the issue. Accordingly, Plaintiffs request that the award be reduced to $1,000.00 or less.

E. Depositions and Discovery Costs

The Court has awarded Defendant half of its written discovery costs and the depositions of Plaintiffs. The Defendant clearly did not spend half of its discovery efforts with Plaintiffs on the four discrete issues above. Indeed, one of them (Boulder County Ordinance) involved no discovery whatsoever. The other three issues involved minimal discovery costs.

Unjust enrichment was challenged as a legal theory. One written interrogatory was propounded on this issue. See Defendant's First Set of Discovery Requests to Plaintiffs at interrogatory #12, attached as **Exhibit 4**.

The dismissal of claims by CQS turned on a single factual issue; whether it owned any property. The discovery on this matter was minimal. One interrogatory was propounded regarding CQS shareholders. There was also a Motion to Compel regarding the names of members. However, none of this discovery dealt with the issue of property owned by CQS. Property ownership was dealt with by a single question in Ms. Gibbs' deposition. See MSJ filed 10-7-14 at ¶12.

Defendant conducted other discovery regarding knowledge of and participation in CQS activities. The depositions of other Plaintiffs, such as John Behrens, involved questions about their involvement with CQS, but not its holdings. See Transcript at 25:10 to 34:14, attached as **Exhibit 5**. This discovery did not pertain to CQS's standing to assert monetary claims and was used for other purposes. Specifically, Defendant used the evidence at trial in an effort to discredit the citizen group as a representative of a broad group. Defendant's award, if any, for discovery associated with the standing arguments should be limited to the minimal discovery done to establish whether the group owned real property.

The principle area where discovery costs may have been incurred on the claims the Court found unjustified pertained to physical and mental injuries. The discovery expenses here consisted of a single interrogatory (see **Exhibit 4** at interrogatory #3), a premature request for medical exams, and some questions in the depositions of Plaintiffs. The deposition of Mr. Behrens is a representative example. The examination covers 54 pages of the transcript. See **Exhibit 5**. The questions regarding physical and mental injuries constitute less than 3 pages. Id. at 42:5 to 44:20. If questions regarding loss of sleep, anxiety and medical conditions are all included, the time spent was 4.28 pages. Id. at 40:13 to 44:20. This means less than 8% of the examination was spent on this issue.

Plaintiffs assert that the interrogatories provide another measure of the time dedicated to the four discrete issues the Court found unjustified. Only two out of fourteen interrogatories (less than 15%) pertained to these claims. Therefore, Plaintiffs assert that the award associated with discover be reduced to no more than 8-15% of the $15,988.50 in discovery costs, or between $1,280 and $2,300.00.

If the Court concludes that the Defendants are bound by their agreement to not seek fees associated with dismissal of purported claims for medical injuries, then this award should be much less as the remaining issues involved *de minimus* discovery efforts.

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

Respectfully submitted this 13th day of August, 2015.

The Law Office of Matthew B. Osofsky, Esq.

//s//Matthew Osofsky

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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 13th day of August, 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.