

DISTRICT COURT, COUNTY OF BOULDER, COLORADO Boulder County District Court Boulder County Justice Center 1777 6 th Street Boulder, CO 80302	DATE FILED: June 11, 2015 4:02 PM FILING ID: 712B61FBE74C2 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.	<p style="text-align: center;">▲ COURT USE ONLY ▲</p> <hr/> Case Number: 2013CV031563
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	Div. 2 Crtrm.: Q
DEFENDANT'S MOTION FOR ATTORNEYS' FEES	

Defendant, Mile-Hi Skydiving Center, Inc. (“Mile-Hi”), by and through counsel Anthony L. Leffert of Robinson, Waters & O’Dorisio, P.C., hereby submits its Motion for Attorneys' Fees incurred in the defense of groundless and frivolous claims, and states and alleges the following:

COMPLIANCE WITH C.R.C.P. 121 § 1-15 (8)

Pursuant to C.R.C.P. 121 § 1-15(8), undersigned counsel has conferred with counsel for the Plaintiffs who oppose this Motion.

LEGAL AUTHORITY

1. C.R.S. § 13-17-10, *et seq.* provides grounds for the Court to award Mile-Hi the attorneys' fees it incurred in this litigation because a number of the Plaintiffs' claims were substantially groundless and/or substantially frivolous. C.R.S. § 13-17-102 provides the Court authority to award reasonable attorneys' fees where an attorney or party has brought a civil

action, either in whole or in part, that the Court determines lacks substantial justification. Further, the Court has the authority to allocate the payment of reasonable attorneys' fees among the offending attorneys and parties, jointly or severally.

2. "The award of attorney fees is an important sanction available to a court in a civil case to punish an attorney or a party who engages in conduct improperly instigating or prolonging litigation." *In re Marriage of Aldrich*, 945 P.2d 1370, 1378 (Colo. 1997). "An award of fees and costs also serves the remedial purpose of compensating an opposing party who has been victimized by the misconduct of an opponent or an attorney. *Id.*

3. Pursuant to C.R.S. § 13-17-102(4), a court "shall assess attorney fees if ... it finds that an attorney or a party brought or defended an action, or any part thereof, that lacked substantial justification..." A claim lacks substantial justification if it is "substantially frivolous, substantially groundless, or substantially vexatious." *Id.* 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 (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.*

MOTION FOR ATTORNEYS' FEES

4. An award of attorneys' fees to Defendant Mile-Hi is necessary to: (1) punish the Plaintiffs and their counsel for improperly instigating and prolonging litigation; and (2) to compensate Mile-Hi for being victimized by the misconduct of the Plaintiffs and their attorneys. Several of the Plaintiffs' claims lacked substantial justification from the outset, and Plaintiffs were never able to present evidence or rational arguments in support of them. The Plaintiffs and their attorneys knew or reasonably should have known that several of their claims for relief and claims for damages lacked substantial justification as they were legally frivolous and lacked any factual basis.

5. The Plaintiffs filed three complaints in this action. The original complaint was filed on October 29, 2013, listing only Citizens for Quiet Skies and Kimberly Gibbs as Plaintiffs. The original complaint asserted claims for negligence, trespass, nuisance, negligence *per se*, *respondeat superior*, and an equitable claim apparently seeking an injunction.

6. The First Amended Complaint was filed on November 22, 2013, and identified Citizens for Quiet Skies and Kimberly Gibbs as plaintiffs. In addition, this complaint named for the first time the Plaintiffs who were identified and solicited by Ms. Gibbs to serve as plaintiffs in this case based upon their location within the flight box. In the First Amended Complaint, Plaintiffs asserted claims for negligence, trespass, nuisance, negligence *per se* for violations of the Boulder County noise ordinance and the City of Longmont Municipal Code, *respondeat superior*, and an equitable claim seeking an injunction. In the First Amended Complaint, the Plaintiffs sought damages for the reduction in value of the Plaintiffs' financial interest in their homes; damages for past and future loss of enjoyment of the Plaintiffs' homes; damages for past and future emotional distress, stress and anxiety of dislocation, and remediation necessitated by the acts of Mile-Hi; damages for past and future pain and suffering, annoyance, disturbance, and

discomfort, both temporary and permanent, and both physical and mental injuries caused by the acts of Mile-Hi; damages to the personal property of the Plaintiffs; and damages for loss on enjoyment in life and medical expenses incurred by the Plaintiffs.

7. On February 12, 2014, the Plaintiffs filed a Motion for Leave to File a Second Amended Complaint which was granted and accepted by the Court on March 19, 2014. The Second Amended Complaint sets forth the same claims and damages as the First Amended Complaint and adds a claim for unjust enrichment.

I. FACTUAL AND LEGAL BASIS FOR AWARDING FEES

8. The factors the Court must consider in determining whether to assess attorney fees and the amount of attorney fees, as set forth in C.R.S. § 13-17-103, all support an award of attorneys' fees in favor of Mile-Hi and against the Plaintiffs and/or their attorney:

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

Plaintiffs and their attorneys apparently did not make any effort to determine the validity of the claims brought by Citizens for Quiet Skies, Inc. or the Plaintiffs' claims for mental and physical injuries, trespass, unjust enrichment, or negligence *per se* for alleged violations of a Boulder County Ordinance.

- 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;"

The Plaintiffs and their attorneys made no efforts after the commencement of the this case to reduce the number of claims being asserted, or to dismiss claims found not to be valid. In fact, it was not until after Mile-Hi had conducted substantial discovery on the issue of what, if any, mental or physical injuries the Plaintiffs suffered, and following months of discovery disputes on the topic, that the Plaintiffs finally withdrew this claim for damages. The Plaintiffs, themselves, admitted they had suffered no such injuries. In addition, it became apparent relatively early in these proceedings that the Plaintiffs had not suffered any physical damage to their real or personal property. However, the Plaintiffs made no effort to dismiss their claims for trespass, despite knowing these claims were not valid. Additionally, the Plaintiffs apparently abandoned their claim for *respondeat superior* some time before trial, only after the claim was thoroughly briefed during the summary judgment stage of this litigation.

- c) "The availability of facts to assist a party in determining the validity of a claim or defense;"

Plaintiffs and their attorneys at all times had all of the facts necessary to determine the validity of their claims in this case.

- d) "The relative financial positions of the parties involved;"

The relative financial positions of the Plaintiffs and their attorneys are unknown.

- e) "Whether or not the action was prosecuted or defended, in whole or in part, in bad faith;"

Plaintiffs and their attorneys brought the claims by Citizens for Quiet Skies, Inc. and for physical and mental injuries, trespass, unjust enrichment, and negligence *per se* regarding the inapplicable Boulder County Ordinance in bad faith and to prolong this litigation.

- f) "Whether or not issues of fact determinative of the validity of a party's claim or defense were reasonably in conflict;"

There were no issues of fact concerning the Plaintiffs' claims for mental or physical injuries, as they each admitted in their individual depositions that they had not suffered any. Moreover, there were no issues of fact concerning the trespass claims, as each Plaintiff admitted that they had suffered no physical damage to their real or personal property. The issues of fact determinative of these claims were never reasonably in conflict. Plaintiffs always knew the facts and there were not conflicting facts that the Plaintiffs and/or their attorneys could have misconstrued.

- g) "The extent to which the party prevailed with respect to the amount of and number of claims in controversy;"

Mile-Hi prevailed on all of the claims asserted by the Plaintiffs. In fact, Mile-Hi prevailed on the trespass, unjust enrichment, and negligence *per se* claims, and on claims but one of Citizens Against Quiet Skies, Inc.'s claims on motions for summary judgment.

- 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;"

The Parties discussed settlement at different junctures during this litigation and engaged in Court-mandated alternative dispute resolution. Throughout these proceedings, however, the Plaintiffs and their attorneys continued to demand unreasonable conditions of settlement that would effectively have put Mile-Hi out of business. As the Court dismissed all of the Plaintiffs' claims and denied imposing the requested conditions, including which airplanes Mile-Hi is able to fly and the hours during which it can operate, the Plaintiffs' settlement demands have proven to be unreasonable.

All of the C.R.S. § 13-17-103 factors support an award of attorneys' fees in favor of Mile-Hi and against the Plaintiffs and their attorneys, jointly and severally, pursuant to C.R.S. § 13-17-101, *et seq.*

A. Claims for Relief by Citizens for Quiet Skies and/or Citizens for Quiet Skies, Inc.

9. Plaintiff Kimberly Gibbs incorporated Citizens for Quiet Skies, Inc. ("Citizens") for the sole purpose of soliciting funds to fuel her prosecution of this case. The Second Amended Complaint asserts claims on behalf of Citizens for negligence, trespass, nuisance, negligence *per se*, *respondeat superior*, unjust enrichment and for injunctive relief. Based upon Citizens' claims, Mile-Hi engaged in discovery efforts regarding the actual entity of Citizens and whether Citizens had any standing to bring these claims. Not only was Mile-Hi forced to engage in discovery efforts regarding Citizens' standing, but also had to bring a Motion to Compel Discovery because Ms. Gibbs and Citizens refused to produce information regarding Citizens' and the identity of its members. In addition, Citizens filed a Motion for Protective Order trying to prevent disclosure of names and contact information for Citizens supporters including emails and email records. (*See* Defendant's Motion to Compel Discovery filed July 23, 2014 and Citizens' Motion for Protective Order filed August 13, 2014.) Information about Citizens' members was important to determine if Citizens' had standing to assert its claims.

10. On October 7, 2014, Mile-Hi filed a Motion for Summary Judgment regarding Claims by Citizens for Quiet Skies, Inc. Citizens for Quiet Skies, Inc. filed a response in opposition to the Motion. In addition to the claims made by Citizens, it also sought damages despite the fact that Citizens owned no real or personal property. Mile-Hi's Motion for Summary Judgment essentially went to the issue of whether Citizens had standing to bring the claims for relief and the monetary damages it was demanding. The Court entered its Order on Defendant's Motion for Summary Judgment on November 24, 2014. The Court considered whether Citizens had standing to bring the claims set forth in the Second Amended Complaint. The Court found that Citizens had not incurred any damages and, accordingly, dismissed the negligence and negligence *per se* claims as asserted by Citizens. The Court also dismissed Citizens' trespass claim on the basis that noise is an intangible intrusion and that the Plaintiffs had not incurred any physical damage to property despite their allegations of such in the Second Amended Complaint. The Court noted that Citizens owned no real property, and therefore, a trespass action cannot lie. In summary, the Court granted Mile-Hi's Motion for Summary Judgment regarding all of Citizens claims with the exception of the claim for injunctive relief.

11. Mile-Hi has maintained since the early stages of this litigation 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 of the case, it was apparent that Citizens' claims lacked any factual or legal basis.

12. The Plaintiffs' and Plaintiffs' counsel knew or reasonably should have known that Citizens for Quiet Skies, Inc. did not own any real or personal property and had no standing to assert claims for damages at the time they filed each of their three complaints. Claims asserted for damages by Citizens lacked substantial justification, were legally frivolous and factually groundless, entitling Mile-Hi to an award of attorneys' fees and costs incurred in defending these claims, conducting discovery, filing a Motion to Compel, 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.

B. The Plaintiffs' claims for damages relating to physical and mental injuries.

13. All of the Plaintiffs' complaints allege that the Plaintiffs suffered physical and mental injuries and seek damages for those injuries and for related medical expenses. Mile-Hi was forced to engage in discovery to defend these claims. In addition, the Plaintiffs' refused to participate in independent physical and mental examinations despite their claims of physical and mental injuries. Mile-Hi was forced to file a Motion to Compel Independent Physical and Mental Examinations of the Plaintiffs on July 23, 2014. The Plaintiffs responded and objected to independent physical and mental examinations by claiming that Mile-Hi had failed to show that the physical and mental conditions of the Plaintiffs were in controversy despite the allegations of their complaints and requests for damages. In this time period, counsel for Mile-Hi repeatedly asked counsel for the Plaintiffs whether the Plaintiffs intended to pursue damages for physical and mental injuries to which no response was received. Even after the depositions of the Plaintiffs wherein they each admitted that they had not incurred any physical or mental injuries, the Plaintiffs continued to pursue these damages. Finally, on November 3, 2014, Plaintiffs' counsel reluctantly filed a "Notice of Withdrawal of Damages for Medical Conditions," wherein the Plaintiffs withdrew their claims for mental or physical injuries and any damages for mental or physical injuries including medical expenses past and future.

14. At the time that all of the complaints were filed, the 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. To require Mile-Hi to engage in discovery, a Motion to Compel Independent Physical and Mental Examinations, and the investigation of these claims, which lacked substantial justification and were factually groundless, entitles Mile-Hi to an award of attorneys' fees.

C. Plaintiffs' claims of trespass.

15. Despite the fact that the Plaintiffs denied having any damage to their real or personal property, they continued to assert a claim for trespass based upon noise from the Mile-Hi skydiving flights. Plaintiffs, and Plaintiff's 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). Given the fact that each of the Plaintiffs denied that they had any physical damage to their real or personal property, their claims for trespass lacked substantial justification. Had Plaintiffs, or Plaintiffs' counsel conducted even the slightest bit of legal research into claims of trespass involving intangible intrusions they would have learned that their claims for trespass in this case were legally frivolous and factually groundless. Mile-Hi was forced to engage in discovery and to investigate this issue. Defendant filed a Motion for Summary Judgment on Plaintiffs' Remaining Claims and on January 5, 2015, the Court dismissed the Plaintiffs' trespass claims. The Court

considered the depositions of the Plaintiffs which were attached to Mile-Hi's Motion for Summary Judgment wherein they admitted that no physical damage had occurred to their property. There was simply no basis for the Plaintiffs' to assert a claim of trespass and Defendant is entitled to its reasonable attorneys' fees in conducting discovery, investigating the claim, and in filing its Motion for Summary Judgment as to the trespass claims.

D. Plaintiffs' claims of unjust enrichment.

16. The Plaintiffs sought leave of the Court to file a Second Amended Complaint solely to add a claim for unjust enrichment claiming that the Plaintiffs had conferred a benefit upon Mile-Hi. There were no facts alleged by the Plaintiffs which would support a claim for unjust enrichment. The Court correctly concluded that the Plaintiffs failed to present any evidence that the Plaintiffs conferred a benefit upon Mile-Hi and granted Mile-Hi's Motion for Summary Judgment as to the unjust enrichment claim.

17. The Plaintiffs' claim of unjust enrichment lacked substantial justification and was factually groundless. Defendant is entitled to its reasonable attorneys' fees in the defense of this claim, including discovery and the filing of its Motion for Summary Judgment as to the unjust enrichment claim.

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

18. The Plaintiffs' First and Second Amended Complaints allege that Mile-Hi violated the Boulder County Noise Ordinance and constituted negligence *per se*. Plaintiffs also sought damages for this claim. Following discovery and investigation of this claim, Mile-Hi filed a Motion for Summary Judgment regarding Preemption of State and Local Laws, including the Boulder County Noise Ordinance. The Court granted Mile-Hi's Motion for Summary Judgment and dismissed the Plaintiffs' negligence *per se* claim with respect to the Boulder County Noise Ordinance, stating that the plain language of the Boulder County Ordinance specifically sets forth an exception for the operation of aircraft or other activities which are subject to federal law with respect to noise control.

19. The Plaintiffs' claim for negligence *per se* with respect to the Boulder County Noise Ordinance lacked substantial justification and was factually groundless. Even a cursory review of the Boulder County Noise Ordinance would have revealed to the Plaintiffs and Plaintiffs' counsel that the ordinance does not apply to the operation of aircraft. It is difficult to imagine how the Plaintiffs could bring such a claim which required Mile-Hi to then conduct discovery, legal research, and to prepare and file a Motion for Summary Judgment as to this claim.

20. Mile-Hi is entitled to its reasonable attorneys' fees and costs for the defense of the Plaintiffs' negligence *per se* claim with respect to the Boulder County Ordinance.

II. SUBMISSION OF ATTORNEYS FEES

20. The reasonableness of an award of attorneys' fees "must be determined in light of all the circumstances, based upon the time and effort reasonably expending by the prevailing party's attorney." *Crow v. Penrose-St. Francis Healthcare System*, 262 P.3d 991, 998 (Colo. App. 2011) (quoting *Tallitsch v. Child Support Services, Inc.*, 926 P.2d 143, 147 (Colo. App. 1996)). "In awarding attorneys' fees, a district court may consider (1) the amount in controversy; (2) the time required to effectively represent the client; (3) the complexity of the action; (4) the value of the legal services to the client; and (5) the customary practice in the legal community regarding fees in similar actions." *Id.* 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 13414 (Colo. App. 1997).

21. "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." *Payan v. Nash Finch Co.*, 310 P.3d 212 (Colo. App. 2012) (quoting *Fox v. Vice*, 131 S.Ct. 2205, 2216 (2011) (internal citations omitted)). In a situation where an award of attorney fees requires allocation between claims and records of attorney fees were not maintained by claim, as with block billing, an after-the-fact allocation of fees based on counsel's estimates is an acceptable means by which to calculate an attorneys' fee award. *See American Water Development, Inc. v. City of Alamosa*, 874 P.2d 352 (Colo. 1994).

22. "Block billing is a form of time-keeping that involves stating the total daily time spent on a case, rather than separating out the time into individual entries describing specific activities." *Payan*, 310 P.3d at 218. "C.R.C.P. 121 § 1-22 does not require a particular type of billing format, nor does it prevent block billing." *Crow*, 262 P.3d at 1000; *see also* Colo. RPC 1.5 cmts. (block billing is not prohibited).

23. Further, when a defendant defends against multiple claims involving a common core of facts and/or based on related legal theories, counsel's efforts or time spent on defending against individual claims may not be readily distinguishable from work on other claims. *See Payan*, 310 P.3d at 219.

24. The total fees for services rendered by Robinson Waters & O'Dorisio, P.C. in this litigation attributable to Mile-Hi's defense against: the claims asserted by Citizens for Quiet Skies and Citizens for Quiet Skies, Inc.; the Plaintiffs' claims related to physical and mental injuries; the Plaintiffs' claims for trespass; the Plaintiffs' claims for unjust enrichment; the Plaintiffs' claims for *respondeat superior*; and the Plaintiffs' claims for negligence *per se* is **\$58,420.74**. See Exhibit 1 at ¶ 3.

25. To calculate the amount of the requested attorneys' fees award, no fees are included for those incurred for services performed prior to drafting and serving Mile-Hi's First Set of Discovery Requests to the Plaintiffs. Additionally, while fees incurred for propounding Mile-Hi's discovery requests and for deposing the Plaintiffs are included in the calculation of fees related to discovery; no fees incurred for responding to the Plaintiffs' discovery requests, the depositions of Plaintiffs' experts or for depositions taken by the Plaintiffs are included. The

attorneys' fees that Mile-Hi incurred to compel the Plaintiffs' discovery responses or document production are included, specifically as they pertain to Mile-Hi's motion to compel discovery responses related to the members of Citizens for Quiet Skies. Additionally, the calculation of fees requested ends on January 5, 2015, the date on which the Court issued its Orders on the motions for summary judgment relating to preemption and the Plaintiffs' remaining claims. Mile-Hi is not requesting any fees incurred for the trial of the remaining claims.

26. Of the total, the fees for services rendered to defend against the claims asserted by Citizens for Quiet Skies and Citizens for Quiet Skies, Inc. for which attorneys fees are awardable is **\$12,728.62**. See Exhibit 1 at ¶ 5. This amount includes fees incurred for legal services performed regarding: Mile-Hi's motion to compel discovery relating to the members of Citizens for Quiet Skies, Inc.; a response to the Plaintiffs' Motion for Protective Order regarding the identities of Citizens for Quiet Skies, Inc.'s members and/or supporters; and legal research for and the drafting of Mile-Hi's Motion for Summary Judgment Regarding Claims by Citizens for Quiet Skies. The court entered judgment in favor of the Defendant on three of the Plaintiffs' claims (negligence, negligence *per se*, and trespass) of the four claims asserted by Citizens' in its Order dated November 24, 2014, evidencing that these claims were substantially groundless, frivolous, and/or vexatious. Thus, 3/4 of the fees incurred by Defendant, **\$12,728.62** of the \$16,971.50 in total fees incurred to defend against those claims, are awardable. Defendant is not requesting fees for the additional claim of nuisance addressed in the motion for summary judgment as to Plaintiff CQS' claims.

27. Of the total fees, the fees that Mile-Hi incurred for services rendered to defend against the Plaintiffs' claims relating to physical and mental injuries which the Plaintiffs' abandoned on November 3, 2014, and for which attorneys' fees are awardable is **\$10,363.50**. See Exhibit 1 at ¶ 6.

28. Mile-Hi seeks fees incurred for services rendered to defend against the individual Plaintiffs' claims for trespass, unjust enrichment, and *respondeat superior* addressed in the Defendant's motion for summary judgment as to remaining claims. On January 5, 2015, the Court entered judgment in favor of Defendant as to the claims for trespass and unjust enrichment. The Plaintiffs abandoned their claim for *respondeat superior*. Therefore, of the total legal fees requested, the fees that Mile-Hi incurred for services rendered to defend against the Plaintiffs' claims for trespass, unjust enrichment, and *respondeat superior* in the amount of \$14,652.50, 3/6 or half of those attorneys' fees are awardable in the amount of **\$7,326.25**. See Exhibit 1 at ¶ 7. Defendant is not requesting fees for the additional three claims of nuisance, negligence, and equitable relief addressed in the motion for summary judgment as to Plaintiffs' remaining claims.

29. Mile-Hi seeks fees incurred for services rendered to defend against the Plaintiffs' claims for negligence *per se* based on an alleged violation of the Boulder County Noise Ordinance addressed in Mile-Hi's motion for summary judgment as to preemption. On January 5, 2015, the Court entered judgment in favor of Defendant as to the claim for negligence *per se* based on an alleged violation of the Boulder County Noise Ordinance. Of the total legal fees, the fees that Mile-Hi incurred for services rendered to defend against the Plaintiffs' claims for negligence *per se* based on an alleged violation of the Boulder County Noise Ordinance in the

amount of \$24,027.75. As the motion addressed the Longmont Noise Ordinance as well, 1/2 of this total is awardable in the amount is **\$12,013.87**. See Exhibit 1 at ¶ 8.

30. Of the total fees, the fees that Mile-Hi incurred for services rendered to propound discovery to the Plaintiffs' and to take the Plaintiffs' depositions in order to defend against their claims and for which attorneys' fees are awardable is **\$15,988.50**. See Exhibit 1 at ¶ 9.

31. Attached hereto is an affidavit of Anthony L. Leffert and a calculation of the fees for services rendered showing the attorneys' fees incurred by Mile-Hi to defend against the Plaintiffs' groundless and frivolous claims. See Exhibit 1 attached hereto and Exhibit A attached to the affidavit of Anthony L. Leffert. The amounts requested in this Motion are less than the amounts actually paid because Mile-Hi does not seek to recover any fees incurred to defend against claims that do not provide for a statutory basis to recover attorneys' fees.

32. The attorneys' fees incurred by Mile-Hi to defend against the Plaintiffs' substantially groundless and/or frivolous claims were necessary and reasonable. See Exhibit 1 at ¶¶ 9-12.

33. A calculation of the fees requested is included. Certain time entries have been fully or partially redacted. See Exhibit A attached to Exhibit 1.

34. The rates charged are reasonable and justified and are based on the skill and experience of the attorneys and the customary rates for attorneys with comparable background, experience and skills. Mr. Leffert is an attorney with more than 30 years of experience in litigation. See Exhibit 1 at ¶ 11. In its Order Re: Affidavit of Anthony Leffert in Support of Award of Attorneys' Fees dated April 22, 2015, the Court held that the rates and fees charged by Mile-Hi's counsel are reasonable given the skill and experience level of Mile-Hi's attorneys and when compared with the customary rates for attorneys in this geographical area.

35. The legal intricacies of this case were complex; the Plaintiffs filed a number of factually and legally groundless claims; there were several discovery disputes throughout the course of litigation; and the motions practice was extensive and lengthy, including several pre-trial motions *in limine*. In fact, the Court awarded Mile-Hi its attorneys' fees related to its Motion *in Limine* Regarding Evidence of the Plaintiffs' Damages for the Plaintiffs' failure and/or delay in providing a calculation of economic damages. All of these factors together resulted in this litigation being extremely time-consuming and expensive.

36. The evidence shows that the legal fees were reasonably incurred.

CONCLUSION

37. Mile-Hi is entitled to an award of attorneys' fees for defending against the Plaintiffs' substantially frivolous claims for relief and damages claims. The Plaintiffs presented no rational argument based on the evidence of the law in support of these claims. Finally, the Plaintiffs presented no credible evidence at trial as a basis for these claims. The Plaintiffs and their attorneys knew or reasonably should have known that several of their claims for relief and claims for damages lacked substantial justification as they were legally frivolous and lacked any factual basis.

38. Mile-Hi is aware that courts are reluctant to award attorneys' fees pursuant to C.R.S. § 13-17-102. However, this case should be viewed in a different light. The Plaintiffs and Plaintiffs' counsel knowingly brought factually baseless claims or claims that were legally frivolous and continued to pursue them. This is not a case where the Plaintiffs and Plaintiffs' counsel brought what they believed to be good faith claims based upon the facts of the case. Had the Plaintiffs only brought claims for negligence, nuisance, and injunction this motion would not have been filed. Instead, the Plaintiffs and Plaintiffs' counsel knowingly brought claims which they either knew or easily could have determined were not legally appropriate or did not have sufficient factual basis. The Plaintiffs intended to make this case as difficult and expensive as possible. They intended to inflict punishment on Mile-Hi and cause Mile-Hi to defend claims that never should have been plead. An award of attorney's fees pursuant to C.R.S. § 13-17-102 is both appropriate and warranted in this case.

WHEREFORE, Defendant Mile-Hi Skydiving Center, Inc. respectfully requests an Order awarding attorneys' fees in its' favor in the amount of **\$58,420.74** and against the Plaintiffs, jointly and severally.

Respectfully submitted this 11th day of June, 2015.

ROBINSON WATERS & O'DORISIO, P.C.

s/Laura J. Ellenberger _____

Anthony L. Leffert, #12375

Laura J. Ellenberger, #43931

Attorneys for Defendant Mile-Hi Skydiving Center, Inc.

CERTIFICATE OF SERVICE

I hereby certify that on June 11, 2015, a true and correct copy of the foregoing **DEFENDANT'S MOTION FOR ATTORNEYS' FEES** was delivered via *ICCES*, addressed to the following:

Randall M. Weiner
Annmarie Cording
Matthew Osofsky
Law Offices of Randall M. Weiner, P.C.
3100 Arapahoe Avenue, Suite 460
Boulder, CO 80303

s/Elizabeth Garfield _____