

<p>FORT COLLINS MUNICIPAL COURT 214 N. Mason Fort Collins, CO 80521 Phone: (970) 221-6800</p> <hr/> <p>Plaintiffs: COLLEEN HOFFMAN, RICK HOFFMAN, and ANN HUNT,</p> <p>v.</p> <p>Defendants: THE CITY COUNCIL OF THE CITY OF FORT COLLINS, the governing body of a Colorado municipal corporation; and THE ADMINISTRATION BRANCH OF THE CITY OF FORT COLLINS, by and through its City Manager, Darin Atteberry.</p>	<p>COURT USE ONLY</p>
<p>Kimberly B. Schutt, #25947 WICK & TRAUTWEIN, LLC 323 South College Avenue, Suite 3 P.O. Box 2166, Fort Collins, CO 80522 Phone Number: (970) 482-4011 E-mail: kschutt@wicklaw.com FAX Number: (970) 482-8929</p> <p>John R. Duval, #10185 FORT COLLINS CITY ATTORNEY'S OFFICE P.O. Box 580, Fort Collins, CO 80522 Phone: (970) 221-6520 Email: jduval@fcgov.com</p>	<p>Case Number: 2017-CIVIL01</p>
<p>DEFENDANT CITY'S RESPONSE TO PLAINTIFFS' MOTION FOR ENTRY OF DEFAULT</p>	

COMES NOW the above-named City of Fort Collins Defendants (jointly, "the City"), by and through its counsel, Kimberly B. Schutt of Wick & Trautwein, LLC, and John R. Duval of the Fort Collins City Attorney's Office, and on behalf of the City, respectfully submits the following response to the Plaintiffs' motion for entry of default:

1. The Plaintiffs' have filed a motion for entry of default against the City, citing C.R.C.P. 55(a), asserting that the City allegedly failed to timely file an Answer in this case. Suffice it to say, the City very much disagrees that it is in default, and submits that the motion for entry of default is indeed wholly without merit and must be denied for the reasons stated below.

2. First, regardless of whether the City's Answer was timely filed (which the City contends it was), it is undisputed that the City did in fact file an Answer on behalf of the City on May 12, 2017. A copy of that Answer was served on the Plaintiffs via email that same afternoon. It is also undisputed that the Court has not ruled on the Plaintiffs' motion for default, which was apparently filed with the Court the same day as the City's Answer and not served on the City until after the Answer was sent to the Plaintiffs.

3. It is a fundamental principle of Colorado law that where, as here, a responsive pleading is filed before a trial court rules on a motion for default judgment, the court commits clear error in granting a motion for default. *See, Reeves v. Colorado Dep't of Corr.*, 155 P.3d 648, 651 (Colo.App. 2007) ("An entry of default judgment is not appropriate when a responsive pleading is filed after the time limits required by C.R.C.P. 55 but before a ruling has been issued"); *Colorado Compensation Ins. Authority v. Raycomm Transworld Industries, Inc.*, 940 P.2d 1000, 1001 (Colo. App. 1996). While the City disputes that the Answer was filed after the time limits required by C.R.C.P. 55, as discussed further below, the fact of the matter is that the Court must deny the motion for default based on this legal authority alone. It does not matter whether the Answer was timely filed or not, as it was clearly filed before any ruling on the motion for default filed with the Court the same day.

4. Notwithstanding said clear reason the motion must be denied, the City also disputes that the Answer was untimely in the first place, or that it was in default. As undersigned counsel specifically advised Plaintiff Colleen Hoffman prior to the Plaintiffs filing their motion for default (see email communications attached hereto as *Exhibit 1*), the City calculated the deadline for a responsive pleading as being May 12, 2017. This calculation was based on the fact that the City received a copy of the Plaintiff's Summons and Complaint on March 20, 2017. The City filed its motion for stay one week later, on March 27, 2017, and that relief was granted by the Court, with the stay being in effect until April 28th, when Fort Collins City Council's Ordinance No. 52, 2017, went into effect and adopted the Colorado Rules of Civil Procedure as applying to this case from that point forward. The City filed its responsive pleading 14 days later on May 12, 2017.

5. As stated in the email communications with the Plaintiff Colleen Hoffman attached to this response, the City could meritoriously argue that, since there were no rules of procedure in effect until April 28, 2017, that the 21-day period for filing an Answer started to run from April 28th. It could also take the position that the Plaintiffs' Summons and Complaint filed by the Plaintiffs was not based on any then-existing rules, and thus invalid in the first instance. However, the City took the very reasonable position that the 21-day period for filing a responsive pleading started to run from the date of service, but was suspended from the time it filed its motion for a stay (which relief was undisputedly granted by the Court) until the stay was lifted on April 28th. The City then had another 14 days from the time the stay was lifted in which to file its responsive pleading, which it clearly did do. Accordingly, under this very reasonable interpretation of the application of the rules of procedure to the unusual case at hand, the City submits its Answer was indeed timely filed. Significantly, the Plaintiffs have not submitted any legal authority to the contrary.

6. In addition, Rule 55 of the Colorado Rules of Procedure provides a process for obtaining a default judgment against a party who has failed to plead or otherwise defend the action. The Court's record in this case clearly indicates the City entered an appearance in this case with its motion for stay, by which it specifically sought relief from this Court and pointed out the lack of then-existing procedural rules, as the Plaintiffs themselves have done throughout this case when convenient to their position. The motion made clear that the City was defending this action, intended to file an Answer (and sought to have the Court impose a deadline if the motion was denied) and desired to have the issues raised by the Plaintiffs reviewed on their merits. Under the law in Colorado, the City's motion for stay was a sufficient appearance for purposes of C.R.C.P. 55(b) to indicate an intent to participate in the litigation. In *BS & C Enterprises, LLC v. Barnett*, 186 P.3d 128 (Colo. App. 2008), the Colorado Court of Appeals discussed at length the purpose of Rule 55 and what constitutes an appearance for purposes of default, emphasizing that the rule is not to be used as technical trap for parties who have entered an appearance in a case, but rather must be applied to "achieve substantial fairness." *Id.* Plaintiffs' request for default is clearly contrary to these principles.

7. From the inception of this case, the Plaintiffs have complained of the lack of procedural rules guiding the process. The City, through its first discussion between undersigned counsel and Plaintiff Colleen Hoffman, advised the Plaintiffs of the then-pending effort of City Council to adopt the Colorado Rules of Civil Procedure to apply to this action by way of ordinance, and invited them to stipulate to the application of those rules in the meantime so that the case could proceed on its merits, and they refused. They later represented to the Court that they were putting together their own set of rules for stipulation, but never did so. They also objected to the provision in the original draft of the ordinance which stated that the rules would apply retroactively once adopted, and that provision was removed by way of amendment on first reading. Yet, they are now basing their motion for default judgment on the very type of retroactive application which they resisted.

8. In fact, if the Court was to adopt the draconian, retroactive application of the rules which the Plaintiffs now urge in asking for default against the City, the Court should instead dismiss their complaint. After all, C.R.C.P. 106(a)(4)(I), which now clearly provides the framework and procedure for review here, limits this Court's review to the record before the body below. The rule contemplates that the parties seeking review will accompany their complaint with a motion and proposed order requiring certification of a record for that review. The plaintiffs clearly did not file such a motion at the time they filed their complaint, and they still have not done so notwithstanding undersigned counsel having specifically discussed that requirement with Plaintiff Colleen Hoffman back in March. Accordingly, under retroactive application of this rule, the Plaintiffs have arguably failed to prosecute their case and it should be dismissed due to lack of a record for this Court to review.

9. However, the City once again reiterates its position that this matter should simply proceed to a determination on the merits on the issues raised by the Plaintiffs in their Complaint, and it should proceed under the framework provided by C.R.C.P. 106(a)(4). Therefore, the Court should deny the Plaintiffs' motion for default and set a deadline in the near future for the Plaintiffs to file a motion and proposed order for certification of the record. The matter should thereafter proceed as set forth in C.R.C.P. 106(a)(4).

WHEREFORE, based upon the multiple reasons set forth above, the City respectfully requests the Court to deny the Plaintiffs' motion for entry of default judgment as being without merit, and to direct the Plaintiffs to file a motion and proposed order for certification of the record for a date certain in the very near future.

DATED this 23rd day of May, 2017.

Respectfully submitted,

WICK & TRAUTWEIN, LLC

By: 
Kimberly B. Schutt, #25947
Attorneys for Defendant

And

John R. Duval, #10185

FORT COLLINS CITY ATTORNEY'S OFFICE
P.O. Box 580
Fort Collins, CO 80522
(970) 221-6520

CERTIFICATE OF SERVICE

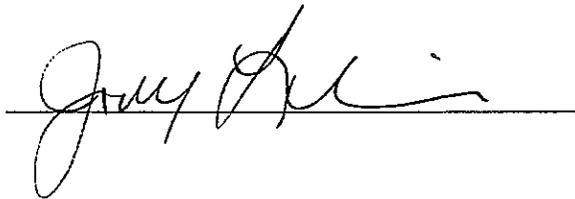
The undersigned hereby certifies that a true and correct copy of the foregoing RESPONSE TO PLAINTIFFS' MOTION FOR ENTRY OF DEFAULT was SERVED via email this 23RD day of May, 2017, on the following:

Colleen Hoffman
1804 Wallenberg Drive
Fort Collins, CO 80526
cohoff@comcast.net

Rick Hoffman
1804 Wallenberg
Fort Collins, CO 80526
Rick-hoffman@comcast.net

Ann Hunt
1800 Wallenberg Drive
Fort Collins, CO 80526
ARH4@comcast.net

Martha L. Fitzgerald
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410 Seventeenth Street, Suite 2200
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mfitzgerald@bhfs.com; cwhite@bhfs.com, gtincher@bhfs.com



K. Schutt

From: K. Schutt <kschutt@wicklaw.com>
Sent: Thursday, May 04, 2017 10:39 AM
To: 'Colleen Hoffman'; 'jduval@fcgov.com'
Cc: 'rick-hoffman@comcast.net'; 'Ann Hunt'
Subject: RE: Hoffman and Hunt v. City of Fort Collins Case No. 2017-CIVIL01

Dear Ms. Hoffman –

I do not agree with your reasoning here, as it appears to be contradictory. We believe we are calculating the deadline in a reasonable way given how a stay of proceedings typically works. As noted in my prior email, it essentially freezes the case as of the time the relief is sought, if granted (which it was here). The City could certainly take the position that, since there were no applicable rules in effect until April 28th (which you acknowledge below), that the 21 days did not even begin to run until that time, so that our answer is not due until March 19th. The City could also take the position that your summons was not based in any then-existing rules, and thus is invalid in the first instance.

However, as I have made clear in all of my communications with you and in our filings with the Court, it is the City's desire to have this case decided on its merits rather than getting caught up in technicalities and gamesmanship around the rules, or lack thereof. I made that quite clear in my first phone call with you as well. We would hope that would be the plaintiffs' goal here as well, if they truly seek a meaningful review of the City Council's decision on their appeal.

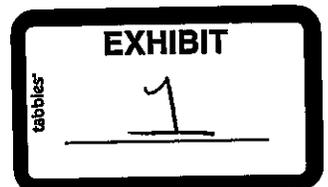
Accordingly, we intend to proceed with having our responsive pleading filed by May 12th, and we believe any effort on your part to seek a default against the City prior to that time will be without merit, and indeed frivolous and groundless.

Kimberly B. Schutt, Esq.

Wick & Trautwein, LLC
(970)482-4011
<http://www.wicklaw.com/>

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From: Colleen Hoffman [<mailto:cohoff@comcast.net>]
Sent: Thursday, May 04, 2017 6:26 AM
To: 'K. Schutt'; jduval@fcgov.com



Cc: rick-hoffman@comcast.net; 'Ann Hunt'

Subject: RE: Hoffman and Hunt v. City of Fort Collins Case No. 2017-CIVIL01

Good Morning Ms. Schutt,

We are not accepting of your tolling of time to file an answer in this case.

The C.R.C.P. is presumed to be in effect at this time and the C.R.C.P. clearly states that an answer is filed within 21 days of service. See C.R.C.P. Rule 12 (a) (1). It is reasonable to expect that the tolling of time was halted during the stay. It is also reasonable to hold that in the absence of rules that existed prior to April 28, 2017, there was no fixed deadline for filing an answer. Even though 21 days had passed since service by the time the stay was ordered, we would not allege that the deadline had lapsed prior to the stay being effected.

However, there is no reasonable way to conclude, as you have, that the tolling of time for an answer was halted by a retroactive order of the court to be effective in March. If you had wished such a result, you should have requested that the court grant such a result. There is no precedent that would allow for an interpretation that an order of any court is retroactive to a prior date unless such condition is clearly stated.

We do not wish to engage in selective application of the Rules that your client was responsible for enacting and which we, with good cause, opposed. Our opposition was predicated, as you know, on the desire to preclude situations such as this.

Colleen Hoffman

Rick Hoffman

Ann Hunt

970-484-8723

cohoff@comcast.net

From: K. Schutt [<mailto:kschutt@wicklaw.com>]

Sent: Wednesday, May 3, 2017 9:52 AM

To: 'Colleen Hoffman' <cohoff@comcast.net>; jduval@fcgov.com

Cc: rick-hoffman@comcast.net; 'Ann Hunt' <arh4@comcast.net>

Subject: RE: Hoffman and Hunt v. City of Fort Collins Case No. 2017-CIVIL01

Good morning, Ms. Hoffman –

The court-ordered stay of proceedings suspends the 21-day period from running as of the time we filed our motion seeking that stay. We filed that motion on March 27th. Therefore, we have calculated the City's deadline to file a responsive pleading to be May 12th, which is 14 days after the stay ended as of April 28th. Accordingly, the City would take the position that it is not in default, and intends to file its responsive pleading by that deadline.

Kimberly B. Schutt, Esq.

Wick & Trautwein, LLC

(970)482-4011

<http://www.wicklawn.com/>

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From: Colleen Hoffman [<mailto:cohoff@comcast.net>]
Sent: Wednesday, May 03, 2017 6:24 AM
To: 'K. Schutt'; jduval@fcgov.com
Cc: rick-hoffman@comcast.net; 'Ann Hunt'
Subject: RE: Hoffman and Hunt v. City of Fort Collins Case No. 2017-CIVIL01

Good morning Ms. Schutt,

In the absence of an "Answer to Complaint" within the 21 day period from March 20, 2017, will you be accepting of a Default Judgment against the City Council and the City Administration at this time?

Colleen Hoffman
Rick Hoffman
Ann Hunt
970-484-8723
cohoff@comcast.net

From: K. Schutt [<mailto:kschutt@wicklaw.com>]
Sent: Monday, April 10, 2017 2:59 PM
To: PNetherton@fcgov.com
Cc: John Duval <jduval@fcgov.com>; Colleen Hoffman <cohoff@comcast.net>; 'Ann Hunt' <arh4@comcast.net>; rick-hoffman@comcast.net; cwhite@bhfs.com
Subject: Hoffman and Hunt v. City of Fort Collins Case No. 2017-CIVIL01

Good afternoon, Ms. Netherton –

Attached please find the City's reply brief in support of its motion for stay of proceedings in this civil action. Per your earlier instructions to the plaintiffs, we are submitting this document via email. If the Court would like an original delivered to the Court, we are happy to do so as well. Hard copies are also being placed in the mail to all three of the plaintiffs this afternoon.

Please let me know if the judge has any further instructions.

Thank you,

Kimberly B. Schutt, Esq.

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(970)482-4011
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