

<p>DISTRICT COURT, LARIMER COUNTY, COLORADO 201 LaPorte Avenue Fort Collins, CO 80521</p>	<p>DATE FILED: August 1, 2018 4:45 PM FILING ID: 3336990C3C2F1 CASE NUMBER: 2018CV149</p>
<p>Plaintiff: ERIC SUTHERLAND, <i>pro se</i></p> <p>v.</p> <p>Defendants: THE CITY OF FORT COLLINS, a home rule municipality in the State of Colorado; STEVE MILLER, in his capacity as the Larimer County Assessor and all successors in this office; IRENE JOSEY, in her capacity as the Larimer County Treasurer and all successors to this office; and</p> <p>Indispensable Parties: THE TIMNATH DEVELOPMENT AUTHORITY, an Urban Renewal Authority; and COMPASS MORTGAGE CORPORATION, an Alabama company doing business in Colorado.</p>	<p>▲ COURT USE ONLY ▲</p>
<p><i>Counsel for The Timnath Development Authority and Compass Mortgage Corporation:</i></p> <p>Eric R. Burris, admitted <i>pro hac vice</i> BROWNSTEIN HYATT FARBER SCHRECK, LLP 201 Third Street NW, Suite 1800 Albuquerque, NM 87102 Phone: 505.244.0770 Email: eburris@bhfs.com</p> <p>Cole J. Woodward, #50199 BROWNSTEIN HYATT FARBER SCHRECK, LLP 410 Seventeenth Street, Suite 2200 Denver, CO 80202-4432 Phone: 303.223.1100 Email: cwoodward@bhfs.com</p> <p><i>Co-Counsel for The Timnath Development Authority:</i> Robert G. Rogers, #43578 Casey K. Lekahal, #46531 WHITE BEAR ANKELE TANAKA & WALDRON 2154 E. Commons Ave., Suite 2000 Centennial, CO 80122 Phone: 303.858.1800 Emails: rrogers@wbapc.com; clekahal@wbapc.com</p>	<p>Case Number: 2018CV149</p> <p>Division: 3C</p>
<p>THE TIMNATH DEVELOPMENT AUTHORITY AND COMPASS MORTGAGE CORPORATION'S COMBINED MOTION FOR ATTORNEYS' FEES AND BILL OF COSTS</p>	

The Timnath Development Authority (“TDA”) and Compass Mortgage Corporation (“Compass”), by and through their counsel of record, White Bear Ankele Tanaka & Waldron Attorneys at Law and Brownstein Hyatt Farber Schreck, LLP, hereby submit the following Motion for Attorneys’ Fees and Bill of Costs pursuant to C.R.C.P. 121, § 1-22, and C.R.C.P. 54(d).

Certificate of Compliance: In accordance with C.R.C.P. 121, § 1-15(8), Counsel for the TDA and Compass attempted to confer in good faith with Plaintiff Eric Sutherland (“Mr. Sutherland”) via telephone at 4:23PM on August 1, 2018. Mr. Sutherland declined to indicate whether he supports or opposes the relief requested herein after multiple requests. Consequently, TDA and Compass presume that Mr. Sutherland opposes the relief requested herein.

I. BACKGROUND

1. Mr. Sutherland filed his Unamended Complaint for Declaratory Judgment and Equitable Relief (the “Complaint”) on April 26, 2018 which alleged that TDA failed to comport with provisions of Colorado’s Urban Renewal Act (the “URA”) at C.R.S. § 13-25-101 and sought to enjoin the Larimer County Assessor from disbursing funds to TDA (the “URA Claims”).

2. The Complaint also included seventeen additional claims against TDA and other Larimer County government entities and officials (the “Additional Claims”).

3. On June 5, 2018 TDA and Compass filed their Joint Motion to Dismiss and Request for Expedited Briefing and Hearing (the “Motion to Dismiss”).

4. On July 11, 2018, this Court issued its Order Granting TDA and Compass’ Joint Motion to Dismiss (the “Order”), finding in favor of TDA and Compass and against Mr. Sutherland.

5. With respect to the URA claims, the Court in its Order held that Mr. Sutherland lacked standing to enforce the URA. Order at 3; *Olson v. City of Golden*, 53 P.3d 747, 750 (Colo. App. 2002).

6. In its Order, the Court also held that Mr. Sutherland failed to sufficiently allege an injury-in-fact with respect to the URA claims. Order at 3.

7. In its Order, the Court also found that the Additional Claims were “1) inapplicable to TDA and [Compass]; 2) are insufficiently pled or 3) both,” and dismissed the Additional Claims. Order at 4.

II. MOTION FOR ATTORNEYS’ FEES

8. C.R.C.P. 121 § 1-22(2)(b) directs a party seeking an award of attorney fees to file and serve a motion that explains: (1) the basis upon which fees are sought; (2) the amount of fees sought; and (3) the method by which those fees were calculated. The rule also directs the moving party to provide supporting documents, including materials evidencing the attorney’s time being spent and the reasonableness of the fees being sought. *Id.*

9. Colorado law requires courts to make an award of attorneys’ fees where:

[A]n attorney or party brought or defended an action, or any part thereof, that lacked substantial justification or that the action, or any part thereof, was interposed for delay or harassment or if it finds that an attorney or party unnecessarily expanded the proceeding by other improper conduct, including, but not limited to, abuses of discovery procedures available under the Colorado rules of civil procedure or a designation by a defending party under section 13-21-111.5(3) that lacked substantial justification. As used in this article, “lacked substantial justification” means substantially frivolous, substantially groundless, or substantially vexatious.

C.R.S. § 13-17-102(4).

10. When evaluating a request for attorneys' fees, Colorado law requires courts to consider certain factors in determining whether to assess fees and the amount of fees to be assessed against any offending attorney or party. C.R.S. § 13-17-103. Those factors are:

- (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.

C.R.S. § 13-17-103.

A. Basis Upon Which Fees Sought

11. Here, TDA and Compass are entitled to attorneys' fees from Mr. Sutherland because his Complaint lacked substantial justification under the applicable definition of that term. A claim lacks substantial justification when it is substantially frivolous, substantially, groundless, or substantially vexatious. C.R.S. § 13-17-102(4).

12. A claim is "frivolous" when the proponent of that claim can present no rational argument based on the evidence or law in support of that claim. *Collins v. Colo. Mountain*

Coll., 56 P.3d 1132, 1136 (Colo. App. 2002)(citing *W. United Realty, Inc. v. Isaacs*, 679 P.2d 1063 (Colo.1984)).

13. In this instance, Mr. Sutherland's claims were frivolous. Mr. Sutherland had no standing to bring this action pursuant to well-established principles of law. *See* Mot. to Dismiss at 5-12. The seminal opinion on taxpayer standing to enforce Colorado's URA was written in 2002, and the law on that issue has not changed substantially since that time. *Olson v. City of Golden*, 53 P.3d 747, 750 (Colo. App. 2002). Mr. Sutherland presents no novel theory of standing in his Complaint that would enable him to state a claim.

14. As the Court noted in its Order, "the URA does not confer the right on taxpayers to enforce its provisions. Order at 3 (citing *Olson*, 53 P.3d at 752). Indeed, its by its terms the URA denies taxpayers standing to enforce its provisions. C.R.S. § 31-25-107(7). It was never possible for Mr. Sutherland to state facts that would enable him to enforce the provisions of the URA. Consequently, his Motion was frivolous under Colorado law.

15. The factors enumerated at C.R.S. § 13-17-103 weigh in favor of an award of attorneys' fees in this case.

16. It is evident from his pleadings that Mr. Sutherland knew that he lacked standing to bring his claims under *Olson* and the URA when he filed his Complaint. Compl., ¶ 33. Thus Mr. Sutherland knew or should have known that his claims had no basis in law at the time they were filed.

17. Of the nineteen claims included in Mr. Sutherland's Complaint, the Court found that seventeen were insufficiently plead. By Mr. Sutherland's own admission, these claims were "insufficiently pled" and "rushed." Pl's Am. Mot. for Reconsideration at 3. Mr.

Sutherland made no effort to reduce the number of claims being asserted or to dismiss claims that were not valid within this action.

18. The material facts surrounding this action were never in dispute, and were always available to Mr. Sutherland. All information regarding TDA's collection of tax revenues is either public record already, or is available to Mr. Sutherland via Colorado's Open Records Act at C.R.S. § 24-72-201 *et seq.* None of the facts that are determinative to Mr. Sutherland's claim for relief can be reasonably disputed by either party.

19. All of Mr. Sutherland's nineteen claims against TDA and Compass were dismissed pursuant to the Court's Order.

20. In light of these facts, an award of attorneys' fees in favor of TDA and Compass is appropriate under Colorado law.

B. Amount of Fees Sought

21. TDA and Compass were principally represented in this matter by Brownstein Hyatt Farber Schreck, LLP ("BHFS"). TDA and Compass seek \$75,532 in attorneys' fees for work performed by BHFS in responding to Mr. Sutherland's Complaint and preparing the Motion to Dismiss. (Ex. 1, Burriss Aff., ¶¶ 2, 6.)

C. Method by Which Fees Are Calculated

22. The determination of what constitutes a reasonable award of attorneys' fees is a question of fact for the trial court and will not be disturbed on review unless it is patently erroneous and unsupported by the evidence. *Brody v. Hellman*, 167 P.3d 192, 198 (Colo. App. 2007). The initial estimate of a reasonable attorney fee is reached by calculating the "lodestar" amount, which represents the number of hours reasonably expended multiplied by a reasonable hourly rate. *Balkind v. Telluride Mountain Title Co.*, 8 P.3d 581, 587-88 (Colo. App. 2000).

That amount may then be adjusted based upon factors including 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, awards in similar cases, and the degree of success achieved.

Tallitsch v. Child Support Servs., Inc., 926 P.2d 143, 147 (Colo. App. 1996).

23. Undersigned calculated the reasonable attorneys' fees in this matter using the lodestar method, i.e., by multiplying the number of hours reasonably expended on the litigation by a reasonable hourly rate. (Ex. 1, Burris Aff., ¶¶ 7, 8, 11.) The Colorado Court of Appeals has explained that the lodestar method "carries with it a strong presumption of reasonableness." *Tallitsch*, 926 P.2d at 147.

24. The hourly rates for the BHFS attorneys and paralegals who worked on this matter are reasonable. (Ex. 1, Burris Aff., ¶¶ 7, 8, 9.) BHFS billed TDA and Compass at its standard rates, which are as follows: (1) \$450 per hour for Eric Burris, a shareholder; (2) \$535 per hour for Carolynne White, a shareholder; (3) \$420 per hour for Ishra Solieman, a staff attorney; (4) \$280 per hour for Cole Woodward, a second-year associate; and (5) \$265 per hour for Penny Lalonde, a senior paralegal. (*Id.* ¶ 8.) These rates are consistent with the billing rates of attorneys and paralegals in similar-sized firms with similar levels of expertise and experience in the local legal community. (*Id.* ¶ 9.)

25. The number of hours expended by BHFS on defending this matter was also reasonable. (Ex. 1, Burris Aff. ¶ 10, 11.) Among other things, BHFS attorneys were required to review and analyze Mr. Sutherland's Complaint, identify its legal and procedural deficiencies, research the effect of those deficiencies, and draft a Motion to the Court requesting appropriate relief. (Ex. 1, ¶ 10.)

26. Moreover, TDA and Compass achieved complete success in the matter, and the Court dismissed all claims brought by Mr. Sutherland against TDA and Compass.

D. Materials Evidencing Time Spent and Reasonableness of Fees

27. The affidavit of Eric R. Burris also sets forth the amount of fees incurred by TDA and Compass in defending the claims brought by Mr. Sutherland. (Ex.1, Burris Aff., ¶ 6.) In addition, attached as Exhibits 2 and 3 are itemized summaries of the tasks performed by each BHFS attorney or paralegal involved in the case, along with the amount of time spent on each task, between May 1, 2018 and the filing of this Motion. Exhibits 2 and 3 evidence the fees TDA and Compass incurred in this action.

28. Mr. Burris' affidavit also explains why TDA and Compass' fees are reasonable under the circumstances. (Ex. 1, Burris Aff., ¶¶ 10, 11.) The hourly rates charged for work performed by BHFS are consistent with market rates for lawyers and paralegals in Denver of similar background and experience. (Ex. 1, ¶¶ 7, 9.) The hourly rates on the invoices reflect BHFS standard rates. (Ex. 1, ¶ 8.)

29. Ultimately, given the nature of the work performed and the result obtained, the attorneys' fees TDA and Compass incurred in defending this action were reasonable. (Ex. 1, ¶¶ 7, 9.)

III. BILL OF COSTS

30. Colo. Rev. Stat. § 13-16-122 lists items that may be included in a party's cost award, but the list of items in the statute is not exhaustive. *Welch v. George*, 19 P.3d 675, 679-80 (Colo. 2000).

31. TDA and Compass are seeking costs that they have incurred in responding to Mr. Sutherland's claims in the amount of \$2,155.00 (Ex. 1, Burris Aff., ¶ 12.)

32. The summary attached as Exhibit 3 includes itemization of the litigation costs and expenses that have been incurred in this matter by BHFS.

33. As set forth in Mr. Burris' Affidavit, TDA and Compass were billed for these costs separately from the attorneys' fees and all of the costs were both reasonable and necessary. (Ex. 1, Burris Aff., ¶¶ 12, 14.)

IV. CONCLUSION

WHEREFORE, TDA and Compass respectfully request that this Court award attorneys' fees and costs, in favor of TDA and Compass, and against Mr. Sutherland, as follows:

- Attorneys' fees in the amount of \$75,532.00; and
- Costs in the amount of \$2,155.00.

DATED this 1st day of August, 2018.

BROWNSTEIN HYATT FARBER SCHRECK, LLP

Original signature on file at offices of Brownstein Hyatt Farber Schreck pursuant to C.R.C.P. 121 § 1-26

By: s/Cole J. Woodward

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Attorneys for The Timnath Development Authority and
Compass Mortgage Corporation

CERTIFICATE OF SERVICE

The undersigned hereby certifies that on this 1st day of August, 2018, a true and correct copy of the foregoing **THE TIMNATH DEVELOPMENT AUTHORITY AND COMPASS MORTGAGE CORPORATION'S COMBINED MOTION FOR ATTORNEYS' FEES AND BILL OF COSTS** was filed with the Court and served via Colorado Courts E-filing System on *pro se Plaintiff* as follows:

By E-Mail and Regular Mail

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