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DISTRICT COURT, LARIMER COUNTY, COLORADO Court Address: 201 La Porte Avenue Fort Collins, CO 80521 Phone Number: (970) 494-3500	
Plaintiff: ERIC SUTHERLAND, *pro se* **v.** **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 **Indispensable Parties:** THE TIMNATH DEVELOPMENT AUTHORITY, an Urban Renewal Authority; and COMPASS MORTGAGE CORPORATION, an Alabama company doing business in Colorado.	**▲COURT USE ONLY▲**
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REPLY IN SUPPORT OF MOTION TO DISMISS OF THE CITY OF FORT COLLINS

The City of Fort Collins (the "City"), by and through its counsel, Sherman & Howard L.L.C. and the Fort Collins City Attorney's Office, submits this reply to Plaintiff's Response to

Defendant City of Fort Collins Motion to Dismiss ("Plaintiff's Response"), and in further support of the Motion to Dismiss of the City of Fort Collins ("the City's Motion"), and states as follows:

I. CLAIMS 14-19 MUST BE DISMISSED

Mr. Sutherland admits that Claims 14 through 19 "were not sufficiently expressed and should be dismissed pursuant to C.R.C.P. Rule 12(b)(5)." Plaintiff's Response at 2. Therefore, this Court should dismiss with prejudice Claims 14 through 19.

II. CLAIM 13 MUST BE DISMISSED

Mr. Sutherland admits that Claim 13 is moot because the City's "[p]reviously issued debt . . . has now been paid in full" and "[n]o action of this Court may unring that bell." Plaintiff's Response at 4. The Court should dismiss Claim 13 with prejudice.

Claim 13 should also be dismissed with prejudice because it fails to state a claim for relief under the Colorado Supreme Court's plausibility standard as explained in Section V of the City's Motion and in reliance on the same legal authority presented below in Section III.C of this Reply. The Plaintiff provides no coherent argument why this is not so. Plaintiff's Response at 4.

III. CLAIM 12 MUST BE DISMISSED DUE TO LACK OF STANDING, C.R.S. § 11-57-210 AND FAILURE TO STATE A CLAIM

The City's Motion established that Claim 12 fails for three reasons. *See* City's Motion at 3–8, 9–16. Plaintiff's Response does not present any evidence to contradict the affidavits and documents supporting the City's Motion. Furthermore, Plaintiff's Response does not present any valid or persuasive argument that would save Claim 12 from dismissal.

A. Plaintiff Does Not Have Standing

Contrary to Mr. Sutherland's unsubstantiated arguments in his Response, *see* Plaintiff's Response at 3, Mr. Sutherland does not have standing to challenge the bond issuance. He has

suffered no injury in fact from the issuance of the 2018 Bonds.[1] Mr. Sutherland fails to rebut the City's evidence with a single piece of evidence, which dooms his argument.[2]

The City submitted strong, conclusive evidence supporting its argument that Mr. Sutherland's alleged injury is too speculative and too remote in time for him to have standing. *See* City's Motion at 5–7. In summary:

1. The alleged injury is too speculative. This fact is supported by the affidavit of Mike Beckstead, the City's Chief Financial Officer. Based on his deep knowledge of the circumstances leading up to the bond issuance, Mr. Beckstead stated in an affidavit that he has "a high degree of confidence there will be no impact on electric rate payers." (Ex. 2 to the City's Motion, ¶ 16.) Mr. Sutherland utterly fails to rebut that statement with any evidence of his own.
2. The alleged injury is too remote in time. Again, the Mr. Beckstead stated under oath that "[i]t will be 5 to 8 years before it can be determined whether there will be any impact on electric utility rates." (Ex. 2 to the City's Motion, ¶ 16.) Once again, Mr. Sutherland does not proffer a single piece of evidence to counter the City's evidence beyond his own opinions.

[1] In addition, Plaintiff's Response makes it questionable whether Mr. Sutherland has a "legally protected interest" that has been injured, which interest is needed to satisfy the second prong of standing. *Hickenlooper v. Freedom from Religion Foundation*, 338 P.3d 1002, 1006 (Colo. 2014). Plaintiff's Response states: "My ***only*** claim and ***only*** purpose for proceeding with this litigation is to hold open the possibility that, in the event the sales of broadband services fail to provide sufficient revenue to make payments to bondholders in keeping with the terms, future decision makers may elect not to raise electric rates in order to satisfy debt service requirements. In this regard, I do have standing to request declaratory judgment of ***my rights*** under the City Code and City Charter." Plaintiff's Response at 3 (emphasis added.) Mr. Sutherland is clearly not seeking to protect his rights or interests, but those of a future City Council. The Colorado Supreme Court has observed that the legally-protected-interest requirement "promotes judicial self-restraint" and recognizes "that parties actually protected by a statute or constitutional provision are generally best situated to vindicate their own rights [citation omitted]." *Id.* at 1007.

[2] Mr. Sutherland agrees that the only issue at play is standing: "the only matter that needs to be decided here is whether or not the possibility of injury . . . is sufficient to grant standing under the circumstances present here." Plaintiff's Response at 5.

Colorado courts universally hold that arguments of counsel do *not* constitute evidence. *See Crow v. Penrose-St. Francis Healthcare System*, 262 P.3d 991, 999 (Colo. App. 2011) (refusing to consider counsel's argument regarding alleged differences in billing rates in opposition to motion for attorneys' fees as evidence to rebut the materials presented by plaintiff because "arguments of counsel are not evidence."); *Sheldon v. Schmidt*, 351 P.2d 288, 290 (Colo. 1960) ("the comments and arguments of counsel are not evidence."); *Cook Inv. Co. v. Seven-Eleven Coffee Shop, Inc.*, 841 P.2d 333, 334 (Colo. App. 1992). The same is true of arguments by a pro se party. *Adams v. Sagee*, 410 P.3d 800, 803 (Colo. App. 2017) ("pro se parties must comply with procedural rules to the same extent as parties represented by attorneys.").

Therefore, Mr. Sutherland's arguments consisting solely of his own opinion are not sufficient to counter the City's solid evidence in support of its argument that Mr. Sutherland does not have standing to challenge the 2018 Bonds.

B. The City's Compliance with C.R.S § 11-57-210 is Conclusive Evidence of the Validity of the 2018 Bonds

The second, independent reason why Claim 12 fails as a matter of law is C.R.S. § 11-57-210 ("the Public Securities Statute"). *See* City's Motion at 7–8. Plaintiff argues that the Public Securities Statue "is, at best, a defense against the Twelfth Claim on the merits of the claim." Plaintiff's Response at 10. Correct, the Public Securities Statue is an absolute bar, as a matter of law, to Plaintiff's Claim 12. Therefore, it follows that Claim 12 is not a viable claim and must be dismissed.

Mr. Sutherland argues that the Public Securities Statute is "facially unconstitutional" and "unconstitutional as applied" here. Plaintiff's Response at 11. However, he does not cite any legal

authority for why this is so. In fact, many states have a comparable statute that courts have reviewed and upheld, as discussed in detail below.

Section 11-57-210 provides:

> An act of issuance providing for the issuance of public securities or an indenture may provide that the securities shall contain a recital that they are issued pursuant to the supplemental public securities act. *Such recital shall be conclusive evidence of the validity and the regularity of the issuance of such public securities after their delivery for value.*

Id. (emphasis added). In Section 213 of the Bond Ordinance, *see* Ex. 1 to the City's Motion at 18, and in each of the bonds issued under the Ordinance, *see id.* at A-2 and B-2, is the recital that satisfies this statute. Therefore, as a matter of law the 2018 Bonds have been issued validly.

Many other states have similar statutes to Colorado's Public Securities Statute, and the vast majority of them deem compliance with such statute to be evidence that such bonds were issued validly. In *Allen v. City of Minot by and through Mayor & City Council*, 363 N.W.2d 553 (N.D. 1985), the Supreme Court of North Dakota addressed a challenge to a bond issuance under its version of the Public Securities Statute. The plaintiff challenged the issuance of municipal bonds authorized by Minot's city council and commenced a declaratory judgment action seeking invalidation of the bonds. *Id.* at 554. On appeal, the question was whether "a competitor who has opposed the issuance of [the] bonds may have the bonds invalidated by a court." *Id.* The court held the plaintiff could not challenge the bonds because they had been issued in accordance with N.D.C.C. § 40-57-12, (North Dakota's version of Colorado's Public Securities Statute). The North Dakota statute stated:

> Revenue bonds bearing the signatures of the appropriate officers who are in office on the date of the signing thereof shall be valid and binding obligations . . . The

> ordinance or resolution authorizing said bonds may provide that the bonds shall contain a recital that they are issued pursuant to this chapter, *and such recital shall be conclusive evidence of their validity and of the regularity of their issuance*.

N.D.C.C. § 40-57-112 (emphasis added). The court explained: "Pursuant to the terms of the statute, the recital is conclusive evidence of the validity and regularity of issuance of the bonds." *Id.* at 555.

The plaintiff argued that the "validity" and "regularity" discussed in the last sentence only apply to technical defects and do not preclude a challenge to the city council's alleged failure to comply with the bond issuance requirements. *Id.* The court disagreed. "We believe [] that the Legislature intended to preclude any challenge to the validity of the bonds." *Id.* The court reasoned, "The legislature obviously intended to protect bondholders from the disruptive effect of a subsequent invalidation of the bonds." *Id.*

The same analysis is equally applicable here. Issuance of the 2018 Bonds under and in compliance with the Colorado Public Securities Statute established conclusively the validity and regularity of their issuance once they were delivered for value. Other states have similarly upheld their versions of the Public Securities Statute against challenges. *See, e.g.*, *Town of Brewton v. Spira*, 17 So. 606, 607 (Ala. 1895) ("When the legislature authorizes a municipal corporation to issue bonds" in compliance with a recital statute, such recital "operates as an estoppel against the city from setting up a defense against an innocent purchaser that they were in fact issued for an unauthorized purpose."); *Baxter v. Dickinson*, 68 P. 601, 603 (Cal. 1902) ("Where the bonds on their face recite the circumstances which bring them within the power, the corporation is estopped to deny the truth of such recital."); *Crawford v. State ex rel. A.M. Klemm & Sons*, 149 So. 340, 341 (Fla. 1933) ("where the power to issue municipal bonds exists, a bona fide purchaser of such

bonds in the open market . . . is entitled to rely on the recitals . . . and such recitals in the affirmative now preclude all inquiry, as against relators, who are shown to be innocent purchasers for the value").[3]

Even the U.S. Supreme Court has held that recitals in bonds, including general ones that the bonds were issued pursuant to a recital statute, are conclusive. *See Bd. of Com'rs of Knox Cnty. v. Aspinwall*, 62 U.S. 539 (1858). In *Aspinwall*, the court explained that "after the authority has been executed, the stock subscribed, and the bonds issued, and in the hands of innocent holders, it would be too late, even if a direct proceeding, to call it into question." *Id.* at 545. The court also provided a separate rationale: "The bonds on their face import a compliance with the law under which they are issued . . . The purchaser was not bound to look further for evidence of a compliance with the conditions to the grant of the power." *Id.*

Therefore, in light of all this persuasive authority, the Court should reject Mr. Sutherland's inadequate attempt to challenge the constitutionality of the Public Securities Statute. The City's compliance with the Public Securities Statute established conclusively that the 2018 Bonds were validly issued as a matter of law and are not subject to challenge by Mr. Sutherland in this action.

C. Claim 12 Does Not Meet the Plausibility Standard and Must Be Dismissed for Failure to State a Claim

Finally, Claim 12 must be dismissed for failing to meet the plausibility standard set out in *Warne v. Hall*, 373 P.3d 588 (Colo. 2016). Colorado's pleading standards require that "*only* a complaint that states a plausible claim for relief survives a motion to dismiss." *Warne*, 373 P.3d at

[3] There is one state court that has held to the contrary. *See Evans v. McFarland*, 85 S.W. 873, 877 (Mo. 1905). The Missouri case, however, is against the great weight of authority. The City has not found any other states that follow *Evans*.

591 (emphasis added) (quoting *Ashcroft v. Iqbal*, 556 U.S. 662, 679 (2009)). Here, Mr. Sutherland has failed to allege sufficient facts for Claim 12 to state a plausible claim for relief.[4] *See* City's Motion at 9–16.

The City countered each of Mr. Sutherland's four arguments that make up Claim 12 with strong evidence and arguments. Mr. Sutherland has failed to rebut any of this with additional evidence or new arguments. The City's four arguments supporting the fact that Mr. Sutherland has failed to state a claim upon which relief can be granted are as follows:

- The City complied with the applicable provisions of the City Charter and the City Code when it formally introduced the Bond Ordinance in printed form at a regular meeting of the City's Electric Utility Enterprise Board on March 20, 2018, and it was adopted by a vote of 6-0; held the final reading of the Bond Ordinance at a regular meeting of the Board on April 3, 2018, where it passed by a vote of 7-0; published the Bond Ordinance in the *Fort Collins Coloradoan* on March 25, 2018, and April 8, 2018; and the Board President of the Enterprise signed it. *See* City's Motion at 11–12.

- The City had the authority to issue the 2018 Bonds because they are an obligation of the City's Electric Utility Enterprise and *not* an obligation of the City. *See* City's Motion at 13.

- The City substantially complied with the City Charter and the City Code by holding the Board meeting the same day and immediately after the City Council meeting, so that any person at the City Council meeting would automatically be in attendance at the beginning of the Board meeting. *See* City's Motion at 13–14.

- Neither the Colorado Constitution, the City Charter, nor the City Code requires that a person be elected president of the Board so the City did not violate the Colorado Constitution. *See* City's Motion at 15–16.

Colorado appellate courts routinely affirm trial courts' grants of motions to dismiss when the plaintiff has failed to meet the plausibility standard. *See, e.g., N.M. by and through Lopez v. Trujillo*, 397 P.3d 370, 377 (Colo. 2017) (under *Warne*'s plausibility standard, concluding that

[4] The City believes it is clear from its Motion to Dismiss that it is *not* arguing, as Mr. Sutherland speculates, that this Court does not have jurisdiction to review whether the City properly adopted the ordinance. *See* Plaintiff's Response at 13. Rather, the City is arguing that Mr. Sutherland fails to meet the pleading requirements to satisfy C.R.C.P. 8.

"N.M. has not sufficiently stated a viable negligence claim on which relief could be granted."); *Abu-Nantambu-El v. State*, No. 16CA1524, 2018 WL 1247540, at *6 (Colo. App. 2018) (affirming trial court's granting defendant's motion to dismiss for plaintiff's failure to state a plausible claim for relief); *Semler v. Hellerstein*, No. 15CA0206, 2016 WL 6087893, at *5 (Colo. App. Oct. 6, 2016) (same); *Ybarra v. Greenberg & Sada, P.C.*, No. 15CA0485, 2016 WL 4247809, at *6 (Colo. App. 2016) (same). Therefore, this Court should not hesitate to grant the City's Motion based on Mr. Sutherland's failure to allege a plausible claim against the City.

IV. CONCLUSION

For the foregoing reasons, the City respectfully requests that this Court dismiss with prejudice all of Mr. Sutherland's claims against the City--Claims 12 through 19. The Court previously dismissed all claims against the "Indispensable Parties" (claims 1-11). *See* Order Granting Defendants Timnath Development Authority and Compass Mortgage Corporation's Joint Motion to Dismiss, at 3, 4. Thus, dismissing Claims 12 through 19 will conclude this matter.

Dated this 15th day of August, 2018.

SHERMAN & HOWARD L.L.C.

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CERTIFICATE OF SERVICE

I hereby certify on the 15th day of August, 2018, that a true and correct copy of the foregoing **REPLY IN SUPPORT OF MOTION TO DISMISS OF THE CITY OF FORT COLLINS** was served via ICCES e-filing system, upon the following:

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