

<p>DISTRICT COURT, LARIMER COUNTY, COLORADO  201 LaPorte Avenue  Fort Collins, CO 80521</p>	<p>DATE FILED: August 30, 2018 10:59 AM  FILING ID: E0637A1846612  CASE NUMBER: 2018CV149</p>
<p><b>Plaintiff:</b>  ERIC SUTHERLAND, <i>pro se</i></p> <p>v.</p> <p><b>Defendants:</b>  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>
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<p><b>REPLY OF THE TIMNATH DEVELOPMENT AUTHORITY AND  COMPASS MORTGAGE CORPORATION IN SUPPORT OF THEIR  COMBINED MOTION FOR ATTORNEYS' FEES AND BILL OF COSTS</b></p>	

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

### **ANALYSIS**

**A. Plaintiff’s Response is Untimely and Need Not be Considered by the Court.**

Plaintiff Eric Sutherland’s Response (the “Response”) to the Motion was untimely, and need not be considered by the Court. TDA and Compass filed their Motion on August 1, 2018. Mr. Sutherland’s Response was due on August 22, 2018. Colo.R.Civ.P. 121 § 1-15(1)(b); Colo.R.Civ.P. 121 § 1-22(2)(b). Mr. Sutherland filed his Response with the Court on August 24, 2018. Mr. Sutherland did not request an expansion of his time to respond from the Court before that period elapsed. Mr. Sutherland failed to comply with the Rules governing his time to respond to the Motion. Consequently the Court may decline to consider the Response, and strike it from the record.

**B. Plaintiff’s Attempt to Distinguish Between Indispensable Parties and Defendants Has No Bearing on This Issue.**

In his Response, Mr. Sutherland attempts to fabricate a distinction between “indispensable parties” and “subject defendants” that has no basis in Colorado law, or the Rules of Civil Procedure. *See* Resp., ¶ 5. Rule 19 provides that when complete relief cannot be accorded among the named parties to an action, an indispensable party who is subject to service of process “shall be joined as a party.” Colo.R.Civ.P. 19(a); *see also* Colo.R.Civ.P. 19(b). TDA and Compass were not foisted upon Mr. Sutherland and his action. He named them himself, and created claims addressing their conduct. Thus, by naming TDA and Compass as supposed

“indispensable parties” (and, in reality, defendants), Mr. Sutherland made them full parties to this action, entitled to the full panoply of rights and protections afforded under the Colorado Rules of Civil Procedure.

Sutherland also argues “there never was any ‘claim’ made against the TDA or Compass Mortgage.” *Id.*, ¶ 2. Yet in the very next sentence, Sutherland admits that he asked the Court for a “declaratory judgment to the effect that legislation [enacted by TDA] that purported to authorize the issuance of debt was not valid by virtue of a failure to properly take that action in accordance with state law.” *Id.*, ¶ 3.

Under Colorado law, courts may assess attorneys’ fees “upon the motion of any party.” C.R.S. § 13-17-102(4). The statute makes no distinction between “indispensable parties” and “subject defendants.” Plaintiff’s efforts to draw a semantic distinction between defendants and indispensable parties have no bearing on whether TDA and Compass are entitled to an award of attorneys’ fees, because Colorado law allows all parties to seek an award of attorneys’ fees when they are compelled to defend against claims that lacked substantial justification. *Id.*

**C. Plaintiff’s Response Establishes that Sutherland Knew That His Claims Against TDA and Compass Were Frivolous at the Time They Were Filed.**

Plaintiff admits that “if I [Plaintiff] had brought an action to enforce the provisions of the Urban Renewal Law, I would not have had standing and [the action] would have been frivolous.” Resp., ¶ 22. That is precisely what transpired in this action. Mr. Sutherland’s Unamended Complaint for Declaratory Judgment and Equitable Relief (the “Complaint”) alleged that the TDA failed to comply with the procedural requirements of the Colorado’s Urban Renewal Act, C.R.S. § 31-25-104. Compl., ¶ 19, 25. TDA and Compass filed their Joint Motion to Dismiss, arguing that Colorado law does not provide taxpayers, like Mr. Sutherland, with standing to enforce the URA. Mot. to Dismiss at 5-13. This Court recognized Plaintiff’s Complaint as a

“thinly veiled attack on Defendant TDA’s compliance with the URA . . . .” and granted the Motion to Dismiss. Order Granting Joint Mot. to Dismiss at 3-4.

Mr. Sutherland was aware of the fact that he lacked standing to enforce the URA at the time he filed his Complaint. Mr. Sutherland cited the dispositive case on this issue, *Olson v. City of Golden*, 53 P.3d 747 (Colo. App. 2002), in his Complaint. Compl., ¶ 33. By his own admission, Mr. Sutherland styled TDA and Compass as “Indispensable Parties” in this action as part of a failed attempt to circumvent the central holding of *Olson*. Resp., ¶ 21. These admissions establish that Mr. Sutherland clearly knew or reasonably should have known that his Complaint was substantially frivolous, which is a prerequisite to an award of attorneys’ fees against a party who is appearing without an attorney under Colorado law. C.R.S. § 13-17-102(6).

**D. Plaintiff Offers No Evidence to Substantiate Allegations that TDA and Compass’s Fees and Costs Are Unreasonable.**

Mr. Sutherland alleges that “many of the billable hours detailed by the Indispensable Parties [in the Motion] were devoted to a desperate search for something other than the hollow defense that was provided.” Resp., ¶ 28. This allegation is unsubstantiated by evidence, and is contradicted by the facts of this case. In reality, the time and effort expended researching and briefing the issue of standing in this matter led directly to the resolution of Plaintiff’s claims in favor of TDA and Compass. Plaintiff’s characterization of the defenses asserted by TDA and Compass as “hollow” cannot withstand even the barest level of scrutiny in light of the fact that that same defense successfully disposed of Mr. Sutherland’s claims against TDA and Compass.



**CERTIFICATE OF SERVICE**

The undersigned hereby certifies that on this 30<sup>th</sup> day of August, 2018, a true and correct copy of the foregoing **REPLY OF THE TIMNATH DEVELOPMENT AUTHORITY AND COMPASS MORTGAGE CORPORATION IN SUPPORT OF THEIR 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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*s/Penny G. Lalonde*

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