8th DISTRICT COURT **LARIMER COUNTY JUSTICE CENTER** Court Address: 201 Laporte Avenue Fort Collins, CO 80521 Phone (970) 494-3500	FILED IN THE LARIMER COUNTY, COLORADO DISTRICT COURTS 18 SEP 24 PM 1:12 DATE FILED: September 24, 2018 CASE NUMBER: 2018CV149
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 to 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 ▲
Party without attorney: Eric Sutherland, pro se 3520 Golden Currant Boulevard Fort Collins, CO 80521 Phone Number: (970) 224 4509 E-mail: sutherix@yahoo.com	Case #: 2018CV149 Division: 3C

PLAINTIFF'S MOTION FOR RECONSIDERATION OF GRANT OF ATTORNEYS' FEES AND BILL OF COSTS

Plaintiff, Eric Sutherland (also referred to here with 1st person pronouns) files this Motion for Reconsideration of Grant of Attorneys' Fees.

Certification of Conference: The undersigned certifies that he has conferred with Counsel for the Plaintiffs via email and explained the basis for the relief requested herein. Plaintiffs have indicated that they oppose the Motion.

I. INTRODUCTION

Motions to reconsider interlocutory orders of the court, meaning motions to reconsider other than those governed by C.R.C.P. Rule 59 and 60, are disfavored. A party moving to reconsider must show more than a disagreement with the court's decision. Such a motion must allege a manifest error of fact or law that clearly mandates a different result or other circumstance resulting in manifest injustice. C.R.C.P. Rule 121 Section 1-15 (11).

This Court's Order awarding fees and costs to Plaintiffs is a manifest error of fact and law. At this time it is reasonable to speculate that the judicial official adjudicating this case, Judge Greg Lammons has not read a single pleading that I have filed into this case or else Judge Lammons is biased and has made rulings that are completely inconsistent with facts and law. Unchallenged facts that I have presented that form the basis of my case have been dismissed as thought they do not exist. Evidence supporting facts offered in a hearing on June 27th that were refused admittance are now also held by this Court to have represented no rational basis. Incorrect legal standards have been applied. The entire basis of my lawsuit brought to request declaratory judgment under Article II section 25 of the Colorado Constitution has been purposefully misstated by this Court to be an effort to enforce the Urban Renewal Authority law, C.R.S. § 31-25-101 *et seq.* Most importantly as it applies to the reconsideration of this Court's abusive and imprudent *Order Granting Fees*, this Court has systematically ignored the rational basis underlying every single element of my lawsuit and has invented for itself the fallacy that this lawsuit was frivolous because it had no rational basis.

II. MANIFEST ERROR OF LAW EVIDENT IN *Order Granting Fees.*

A. Basis of standing was misapprehended.

Astoundingly, the *Order Granting Fees* provided the single instance that either this Court or opposing counsel engaged with the narrative that I had presented[1] to form the basis of my standing in this matter. Otherwise, my facts and argument had been completely ignored. Equally astounding, this single engagement betrayed a complete misapprehension of the narrative. This Court wrote, *"Here, Mr. Sutherland's claimed injury centers on his beliefs that (1) Poudre School District will raise taxes due to lost revenue."* *Order* at p. 4 C.

First of all, the Poudre School District does not LOSE revenue. That is a good thing. Schools in Colorado are not funded well and it would be unfortunate if they were to LOSE anything. *See* Mill Levy Resolutions in Exhibits to *Response to Joint MTD, also Response to Defendants' MTD.*

Secondly, rule of law, not my beliefs, requires that higher taxes be paid by the property owners of the Poudre School District to ***backfill*** tax revenue diverted to the Timnath Development Authority, the "TDA". Taxes are made higher *by law* every time a tax dollar attributable to PSD's ***voter approved FIXED AMOUNT*** tax components is diverted to the TDA. This has been demonstrated by facts that were never challenged and must be construed in this circumstance to be true. This has also been demonstrated by showing that the methodology by which the Poudre School District must calculate its mill levies every year is consistent with applicable law. *Response to Joint Motion to Dismiss..*

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[1] This narrative was presented no less than 4 times. The 4 separate instances in which the narrative I presented to establish standing were; 1) *Plaintiff's Amended Response to Joint Motion to Dismiss,* also referred to as *"Response to Joint Motion to Dismiss"*, filed on June 28, 2018, *2) Plaintiffs First Amended Motion for Reconsideration of Order Granting Indispensable Parties' Motion to Dismiss,* also referred to as *"Motion for Reconsideration of Joint MTD"*, filed on July 27, 2018, *3) Plaintiffs Response to Defendants' Steve Miller and Irene Josey's Motion to Dismiss,* also referred to as *"Response to Defendants MTD"*, filed on August 24, 2018, and 4) *Plaintiff's Response to Indispensable Parties' Timnath Development Authority and Compass Mortgage Corporations Combined Motion for Attorney's Fees and Bill of Costs,* also referred to as *"Response to Motion for Fees"*, also filed on August 24, 2018.

There is a simple mathematical principle at work here that seems to have escaped this Court. Tax revenue attributable to the property taxes levied by public entities may not be diverted to the TDA without someone or some entity taking a loss. There ain't no such thing as a free lunch. The losses experienced by others in order for the TDA to receive property tax revenue attributable to the levies of other public entities take 3 different forms. A breakdown of these 3 different scenarios is presented here in the context of standing to challenge unlawful diversions:

> Scenario 1) Districts other than school districts with ***fixed rate*** mill levies. This includes county governments, special districts etc. Here, the district simply LOSEs the revenue. If the diversion is unlawful, the District with the mill levy has standing.
>
> Scenario 2) School district ***fixed rate*** general fund mill levy. This is the component of a school district's tax that is required by state law, C.R.S. §22-54-106 (2)(a), to be levied. When tax attributable to this component levy is unlawfully diverted, the state of Colorado, not the school district, is injured. (State backfills revenue lost to the GF levy in order to guaranty funding prescribed statute in accordance with General Assembly appropriations.)
>
> Scenario 3) School district ***fixed amount*** override (MLO) and bond levies. These are ***voter approved FIXED AMOUNT*** levies. When tax attributable to these component levies is unlawfully diverted, the property owners of the district are injured. (Property owners backfill revenue lost to TIF.)
>
> (there are also a few ***fixed rate*** MLOs, but they are not common and Poudre School District has none. In this situation, the school district is injured by unlawful diversions to TIF and would have standing in the same manner as in Scenario 1) above.)

In this case, I filed suit alleging injury stemming from Scenario 3) above. The TDA was going to borrow more money. Borrowing more money necessarily increased the length of time in which the state of Colorado, through its agents, the Larimer County Assessor and County Treasurer, would be obligated to divert

property tax to the TDA. Timnath had not reformed its Board in a manner consistent with recent amendments to the URA law. If Timnath borrowed more money, then the length of time in future years in which Timnath would receive tax revenue attributable to the ***voter approved FIXED AMOUNT*** school district component levies would be increased. Also, the length of time in future years in which the property owners of the Poudre School District would be backfilling the diversions of property tax to the TDA would be increased. See *Response to Joint MTD* and other pleadings mentioned in footnote 1.

None of the previous analysis was based on speculation. All of the necessary factual pieces of this analyses were supported by evidence. Every single operation and machination of the process by which property owners ***backfill*** the Poudre School District with higher taxes for certain component levies is prescribed by statute and has been described multiple times in pleading before this Court.

This Court simply got it wrong ... and this is proven with the statement made by this Court in its *Order Granting Fees,* p. 4 C. (*his beliefs that Poudre School District will raise taxes due to lost revenue")* The Poudre School District does not LOSE revenue. The property owners ***backfill*** any diversions of the District's levies by paying higher tax rates.

More importantly, to the extent that this Court is not persuaded of its error evidenced by its misstatement, there can be no question that a rational basis underlies every element of the argument I presented. This Court's finding of frivolous action in this matter is suspect in the highest degree of bias.

B. Basis of the claims was misapprehended.

This Court has also completely misapprehended the basis of the claims that were brought in this action. A comparison of the finding of this Court as to the

basis of the First Claim for Relief with that stated in the Complaint demonstrates the error of this Court.

On page 5 of the *Order Granting Fees,* this Court wrote: *"Mr. Sutherland sought a ruling that certain bonds are invalid because the proper procedures were not followed."*

Yet, the First Claim for Relief does not seek a ruling that certain bonds are invalid. Rather, I sought a ruling that the County Treasurer shall not pay property tax increment that may be used by the TDA for the purposes of paying said bonds. ¶ 20 *Unamended Complaint.* The difference is substantial. No declaration of the validity of the bonds was requested. This Court's error in this regard demonstrates a complete lack of understanding of what was before the Court in this action.

The reason, of course, for alleging the failure of due process inherent in the TDA's failure to reform its Board is because I wish to avoid the higher tax rates that are, pursuant to the previous sub-section, an absolute consequence under law since the property owners are going to repay the bonds in question with tax revenue collected to ***backfill*** the diversions of tax revenue to the TDA.

Perhaps I failed to persuade this Court that the basis for my action was justiciable. But there can be no question that a rational basis underlies every single element of this case and that rational basis was expressed in pleadings filed with this Court. A finding to the contrary is clear error.

C. Improper legal standards were applied.

This Court cited three reasons why my action was substantially frivolous. *Order Granting Fees* p.3. The findings of this Court in regard to all three reveal clear error.

i. Clear error in II. A. Standing

Every single statement in the paragraph under A. Standing is in error. Each erroneous statement is refuted in turn below.

This Court wrote: "*Mr. Sutherland, "clearly knew or reasonably should have known" that the action he filed was substantially frivolous, C.R.S. § 13-17-102(6).*" I did not know nor should I have reasonably known that the action that I filed was substantially frivolous. To the contrary, I knew that my right under the Colorado Constitution to not be deprived of property without due process of law was being impaired by the improper creation of debt by the TDA that would unquestionably require higher tax rates to be paid by myself and all other property owners in the Poudre School District because property owners must ***backfill*** all diversions of tax increment paid to the TDA to repay the debt.

This Court wrote: "*Mr. Sutherland brought this action primarily as an attempt to enforce the provisions of the URA*". To the contrary, I brought this action exclusively for the purposes of requesting a declaration of my rights under Article II section 25 of the Colorado Constitution. See *Response to Joint MTD* at p.2 and 13 other similar statements. There can be no question that if tax dollars are being diverted to the TDA in a manner that is inconsistent with law, then the taxpayers that pay higher tax rates as a consequence have standing to request judicial review of any alleged legal inconsistency that will lead to higher tax rates. On this basis, I requested judicial review in the form of a declaratory judgment of my rights under the due process clause of the Colorado Constitution, Article II section 25. Other constitutional protections may also be looked to for relief. As I have stated several times, the TDA may ignore the URA law with abandon and it does, but an attempt to avoid economic injury by asserting constitutional rights was the primary cause of action. If that cause of action may be seen as an attempt to

enforce the URA law, then that purpose is incidental, inseparable and secondary to the primary purpose.

This Court wrote: "*Colorado Law is clear that taxpayers do not have standing to enforce the provisions of this statute*". (citing *Olson v. City of Golden,* 53 P.3d 747, 752 (Colo. App. 2002) This is where this Court simply left the rails. It is true that the URA law does not create a private cause of action similar to statutes such as C.R.S. § 11-57-213 or § 1-11-203.5. It is also true the *Olson* court issued a treatise on standing that undoubtedly precludes any interpretation of the URA law that could be construed as a private cause of action. However, it is also true that the URA law does not contain anything that can be construed to be a non-claim statute such as C.R.S. § 11-57-212 or § 1-11-203.5. Thus, the *Olson* court did not create any bar to inquiry or anything that can be construed to be a bar. The question of challenges asserting relief under the Colorado Constitution was at issue in *Olson*, but only in terms of the TABOR amendment. The *Olson* court made no determinations about the rights of taxpayers to claim relief under any other provision of the Colorado Constitution. **This Court's ruling, if allowed to stand, would abridge constitutional rights of taxpayers. Olson v. City of Golden may not be read to preclude a challenge asserting constitutional rights.**

This Court wrote, "*Mr. Sutherland was aware of the prohibition when he filed his petition.*" As previously explained, I was not aware of any prohibition because no such prohibition exists in *Olson v. Golden.* This Court has, without question, read a prohibition into the *Olson* case that is not there. In the United States of America and in the State of Colorado, our courts determine the rights of taxpayers to request relief under the constitution. The *Olson* court **could not** have created a prohibition that would impair the constitutional rights of taxpayers to allege violation of constitutional rights and it **did not** create such a prohibition.

This right to review is the foundation of our system of law. This perplexing and somewhat unbelievable misinterpretation of the meaning of *Olson* goes hand in hand with this Courts' complete disregard for the authority that does control taxpayer lawsuits brought under the constitution, i.e. *Barber v. Ritter, etc.*, in which our Colorado Supreme Court has consistently granted broad standing to taxpayers in matters where the rights of taxpayers under the Colorado Constitution are at issue. The complete misapprehension of the scope and effect of the *Olson* case by this court also goes hand in hand with this Court's disregard of authority that controls the standard to be applied to questions of jurisdiction in declaratory judgment actions.

This court wrote: "*Despite being aware of this bar to standing, Mr. Sutherland filed a complaint alleging .....*" As previously explained, I had a firm grasp on all facts and matters of law that control for standing in the instant case. My grasp on this material had been gained from years of study and observation. These years of study and observation provided for a theory of the law as to my standing that was consistent and harmonious with all authority on the subject. Challenges of constitutional dimension are not barred by *Olson v. City of Golden* or any other authority that is applicable to this case. However, even if I failed to persuade this court to accept my theory of law, there can be absolutely no questioning whether or not it was groundless. There was a rational basis underlying every premise and conclusion of law that I brought to support my case for standing. This is true for the preceding 4 paragraphs as well. Being misunderstood is not being frivolous. Ending up as the advocate for the less persuasive of two positions is not frivolous either.

ii. Clear error in II. B. Claims for relief

This court found that claims 4 through 11 and claims 14 through 19 are not recognizable as claims. This is not disputed. The presence of these claims has been explained to be the addition of place-holders that were expected to be amended or withdrawn by filing an amended petition. The *Unamended Complaint* was hastily filed to comply with the limitations of a non-claim statute. It did happen that the months immediately after the suit also saw my responsibilities to two ailing parents create significant challenges. It did also happen that the Compass Bank and the TDA waived service, filed a *Motion to Dismiss* and also entered two counterclaims. I informed this Court that, if the action was allowed to continue, that I would request leave to amend the complaint. See *Amended Response to Joint MTD* at p. However, a motion to amend would have requested relief that was without effect once the *Motion to Dismiss* was granted and my *Motion for Reconsideration* was denied. It is clear error for this Court to look to the remnants of place holders in an *Unamended Complaint* as evidence that the action was frivolous. That language identified as a claim for the placeholders was obviously superfluous and without effect due. There can be no doubt that good practice would have prescribed withdrawal of claims, but failing to do so did not prejudice any party to this action.

iii. Clear error in II. C. Injury-in-fact

This Court applied an incorrect standard for determining standing in a declaratory judgment action to this case. If the decision of this Court represented the correct standard, then the entire Uniform Declaratory Judgment Act would be rendered meaningless. Rather than view this action as request for declaratory judgment and apply the relaxed standard consistent with authority I had cited (see *Amended Response to Joint MTD* at p. 23), this Court applied a general standard applicable to claims for relief such as in tort actions or requests for equitable relief.

The whole point of declaratory judgment action is that a Plaintiff ***NEED NOT*** suffer an injury-in-fact in order to request judicial review of his or her rights under the law. That is the whole point. One need not actually suffer injury prior to commencing an action.

Here, this Court has laid its misunderstanding of the law of declaratory judgments out like a place setting at a table. *"Mr. Sutherland did not suffer any injury-in-fact, as required by Colorado standing law, before he commenced the action", Order* at p.4 C. Ironically, this statement by the Court is true. I asked for declaratory judgment because I knew my right to due process in governmental actions that affect the tax rates I pay were abridged by the actions of the Timnath Development Authority.

Of course, I had expanded upon the relaxed standard applied to determinations of standing in declaratory judgment actions on four different occasions (see footnote 1 of this *Motion*) citing *Mt. Emmons v. Town of Crested Butte,* 690 P. 2d 231, Colo 1984. This was not the standard that was applied. Instead, this Court applied a standard that would simply eliminate any utility whatsoever of the UJDA. There is no doubt "that a declaratory judgment action must be based on an actual controversy." *Beacom v. Board of County Commissioners*, 657 P.2d 440 (Colo.1983); *Farmers Elevator Co. v. First National Bank*, 176 Colo. 168, 489 P.2d 318 (1971). To have standing, a plaintiff must establish that his or her rights are adversely affected by a governmental action. This requirement does not mean, however, that a plaintiff must risk the loss of property to secure the adjudication of uncertain legal rights. See *CF & I Steel Corp. v. Colorado Air Pollution Control Commission*, 199 Colo. 270, 610 P.2d 85 (1980); *Johnson v. District Court*, 195 Colo. 169, 576 P.2d 167 (1978); *Colorado State Bd. of Optometric Examiners v. Dixon*, 165 Colo. 488, 440 P.2d 287 (1968).

Here again, this Court must take note of the fact that, even if the Court were to disagree with my authorities and argument, they were not baseless. There was a rational basis underlying every element of my case.

III. COMPLETE ABSENCE OF REFUTATION OF FACTS BY DEFENDANTS

The complete refusal of the TDA and Compass to engage in any way with the narrative I had laid out by disputing facts or theories of law speaks volumes about the manifest injustice that the $75,000 award of fees represents.

A. Issues of fact ignored.

On page 5, of the *Order Granting Fees,* this Court wrote: "*There are no issues of fact in conflict in this matter.*" Ironically, this statement hints at the real truth underlying the factual matters of this case. The facts were never disputed. However, it is not true that there was no conflict in factual matters in this case. The conflict was whether or not the facts I brought to this case exist or not. The Defendants and this Court elected to find that inconvenient facts do not exist. I hold that they do exist and must be considered.

I presented evidence to demonstrate that the Poudre School District has authority to tax property owners on the basis of several approvals for new taxes that were granted by the electorate of the district. Each of these component tax approvals have authorized the collection of ***FIXED AMOUNTS*** of tax revenue on an annual basis. *The TDA and Compass never disputed this fact.*

I presented evidence to demonstrate that the tax rate that was levied against the assessed value of property in the district is calculated by dividing the total revenue expectation of every component unit by the quantity of total assessed value in the district less that amount excluded by C.R.S. §39-5-128. (The "tax rate equation"). *The TDA and Compass never disputed this fact.*

I presented evidence and argued that any exclusion of property from the total amount that is used in the denominator of the tax rate equation leads to a higher tax rate. *The TDA and Compass never disputed this fact.*

I presented facts that demonstrated that the creation of additional debt by the TDA would lead to an increase in the number of years in which the denominator in the tax rate equation would be smaller leading to an increase in the tax rate. *The TDA and Compass never disputed this fact.*

B. Matters of law were ignored.

I argued that any circumstances in which the creation of new debt was improperly authorized could be addressed by declaratory judgment as to the rights of taxpayers to be free from obligations to pay tax at a higher rate. *The TDA and Compass never disputed this theory of law.*

I argued that the division of the Court of Appeals that had decided *Olson v. City of Golden,* 53 P. 3d 747 (Colo. App. 2002) had not established a bar to inquiry in all matters pertaining to the URA law, but had, instead, delivered a treatise on standing that was consistent with status of law then and now. *The TDA and Compass never disputed this theory of law.*

I argued that a relaxed standard for standing has been adopted by the Colorado Courts in declaratory judgment actions that, even though it need not be relied upon in this matter because the threat of injury is determinate, imminent and palpable, nevertheless must be considered when evaluating my standing to request declaratory judgment. *The TDA and Compass never disputed this theory of law.*

IV. CALCULATION OF FEES SHOWS CLEAR ERROR.

Compass Bank and the TDA are attempting to collect fees for legal work associated with entering two counterclaims that were subsequently withdrawn by

Compass Bank and the TDA. The award request and amount include legal work done to advance these counter-claims. No differentiation between the legal work performed to bring the *Joint Motion to Disimss* and the legal work performed to bring and then withdraw the counter-claims has been made in any of the accounting provided to this Court.

Upon waiving service, Compass Bank and the TDA filed separate Answers. The Answer of the TDA made two counterclaims; a claim for injunction against me, the "injunction claim", and a claim for damages, the "damages claim". Also, Compass Bank and the TDA filed a Joint Motion for Injunctive Relief Pursuant to Rule C.R.C.P Rule 65.

The injunction claim and the damages claim can clearly be seen to have been entered for the purpose of: 1) Prejudicing this court against me, 2) Harassing and intimidating me and 3) pumping up the billable hours. The 2 claims transmigrated into another action brought against me by the TDA and also the Town of Timnath. This Court elected not to grant the Motion for Injunctive Relief. The TDA then filed a *Motion to Withdraw* the two claims on July 27th, 2018. At the time of this filing this *Motion to Withdraw* had not been granted or denied by this Court despite having been ripe for decision for over a month.

The injunction claim and especially the damages claim can both be seen to be moot for lack of subject matter jurisdiction. The TDA has built a house of cards. The TDA is the beneficiary of tens of millions of dollars in loan proceeds from Compass Bank. The legal and financial realities surrounding this house of cards indicates that Compass has been relying upon two sources of repayment from the TDA for an unsecured loan, yet neither source of funding is enforceable in any way in court should the source of funds terminate by the decisions of others outside the control of the TDA and Compass. These matters continue to be

weighed in 2018CV030567. However, it must be noted that the Plaintiffs in that action, the TDA and Timnath, elected not to bring the damages claim when filing the Complaint against me. This has not stopped the TDA and Timnath from making many threats that were made as though the damages claim was still at issue in –567. At present, Judge Lowenbach has instructed the TDA and Timnath to file a motion for leave to amend their complaint on or before October 1st, 2018.[2] The fallacy of the injunction claim and the damages claim can be readily observed by simply noting that the only action that the TDA needed to do to avoid any legal conflict was reform its Board of Commissioners as directed by the General Assembly. The failure to take this simple step speaks volumes when compared to the claims of significant monetary damage that is alleged against me.

Also, the injunction claim and the damages claim can both be seen to be moot on the basis of a practical matter; I am barred by the doctrine of *res judicata* from entering new claims against Compass or the TDA.

Against the backdrop of the harassment, intimidation and manipulation that the entire issue of the two counterclaims represents, it is not unreasonable to speculate that Compass and the TDA purposefully attempted to further subject me to prejudice and hardship by failing in any way to properly account for the difference between the legal work for that part of the defense that was maintained versus that part of the defense that was abandoned in this action. The veracity of this claim can be further substantiated by noting that only the TDA brought the counter-claims, yet the balance of the total sum was split nearly evenly between the two parties.

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[2] The doctrine of *res judicata* would appear to preclude Judge Lowenbach from granting such a Motion.

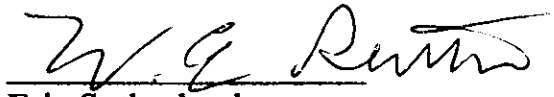
At a bare minimum, this Court should request that this accounting be properly provided so as to only consider an award of fees for legal work maintained and not abandoned.

V. CONCLUSION

I presented a totality of facts and legal conclusions based upon evidence and rational thought to support the conclusion that I should be granted standing in this matter. My beliefs, which are fundamental to an assessment of frivolousness, were clearly stated, salient and, most importantly, never disputed by the TDA and Compass.

Yet, at the critical juncture of determining whether or not I believed I could and should prevail, this Court unexpectedly and without any rational basis concluded that I knew all along that I could not prevail. Of course, I knew no such thing. This Court's grant of Fees and Costs in this matter is a manifest error of law and must be reversed by this Court.

WHEREFORE, Plaintiff requests that that this Court vacate the *Order Granting Fees* and issue an Order consistent with a finding that this case was not frivolous and Compass Bank and the TDA are not entitled to fees and costs.



Dated September 24,, 2018

Eric Sutherland

I hereby certify that on this 24th Day of September, 2018, a true and correct copy of the foregoing *Plaintiff's Motion for Reconsideration of Grant of Attorneys' Fees and Bill of Costs* was filed with the Court. Also, a true and correct copy of the foregoing and an accompanying Proposed Order and affidavit in Support of the Motion will be served via email to the following no later than September 24th, 2018.

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By _____