

<p>DISTRICT COURT, LARIMER COUNTY, COLORADO Court Address: 201 La Porte Avenue Fort Collins, CO 80521 Phone Number: (970) 494-3500</p>	<p>DATE FILED: July 25, 2019 10:54 AM FILING ID: 1243363B9C700 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>Attorneys for Defendant City of Fort Collins:</i> John W. Mill (#22348) Rosemary A. Loehr (#52559) Sherman & Howard L.L.C. 633 17th Street, Suite 3000 Denver, CO 80202 Phone Number: (303) 297-2900 jmill@shermanhoward.com rloehr@shermanhoward.com</p> <p>Carrie M. Daggett, #23316 John R. Duval, #10185 Fort Collins City Attorney's Office 300 LaPorte Avenue Fort Collins, CO 80522-0580 970-221-6520 cddaggett@fcgov.com jduval@fcgov.com</p>	<p>Case No.: 2018CV149</p> <p>Courtroom/Division: 5B</p>
<p>CITY OF FORT COLLINS' SECOND MOTION FOR ATTORNEYS' FEES & COSTS</p>	

The Defendant City of Fort Collins (the “City”), by and through its counsel, respectfully submits the following request for attorneys’ fees and costs against Plaintiff Mr. Sutherland.

Certificate of Conferral: Pursuant to C.R.C.P. 121, § 1-15(8), the City’s undersigned counsel conferred with Plaintiff regarding the relief sought in this Motion. Plaintiff opposes the City’s Motion.

INTRODUCTION

The Court awarded the City \$40,243.27 in attorneys’ fees and costs for Mr. Sutherland’s frivolous claims against the City. *See* Order Granting Fort Collins’s Motion for Attorneys’ Fees and Bill of Costs at 8. (Apr. 2, 2019) (“the Order Awarding Fees”). The Order Awarding Fees covered fees and costs incurred by the City through January 12, 2019 as reflected on invoices by the City’s outside counsel through January 2019. However, the Order Awarding Fees did not address fees and costs incurred by the City after January 12, 2019. Now, in the instant motion, the City requests an award of fees and costs pursuant to C.R.S. § 13-17-102 for the fees and costs incurred after January 12, 2019. The requested fees and costs fall into two categories that both relate to Mr. Sutherland’s frivolous claims and conduct in this case.

First, the City was required to incur substantial fees and costs to seek attorneys’ fees for Mr. Sutherland’s frivolous claims. The City had to prepare for and participate in a hearing requested by Mr. Sutherland, on the City’s first motion for fees and costs. That hearing was held on March 15, 2019. Preparing for and participating in the March 15 hearing required substantial work and substantial expense—all of which was exacerbated by Mr. Sutherland’s frivolous conduct before and during the hearing. The fees and costs for that work were included on the City’s outside counsel’s February 28 and March 25, 2019 invoices. The City did not previously

request these fees and costs as the invoices reflecting them were issued either shortly before or after the March 15, 2019 hearing.

Second, Mr. Sutherland unnecessarily expanded the scope of this proceeding to the detriment of the taxpayers of Fort Collins by filing five post-judgment motions. The fees and costs for that work were included on the City's outside counsel's April through June 2019 invoices.

ARGUMENT

Pursuant to C.R.S. § 13-17-102(4), the City is entitled to an award of attorneys' fees against Mr. Sutherland to compensate the City for the fees and costs it incurred responding to Mr. Sutherland's continued frivolous litigation tactics. Colorado's attorney fees act, C.R.S. §§ 13-17-101 *et seq.*, authorizes courts to assess attorney fees whenever "any part" of "any civil action of any nature" lacks justification or "was interposed for delay or harassment" or "unnecessarily expanded the proceeding by other improper conduct." C.R.S. § 13-17-102(4). "Any part" of "any civil action" includes conduct during the litigation as well as post-judgment conduct. *See, e.g., Anderson Boneless Beef v. Sunshine Health Care Center*, 878 P.2d 98, 101 (Colo. App. 1994) (noting the expansive reach of the statute and holding that "any part" of "any civil action" extends to post-judgment conduct); *see also Smith v. Greeley Stampede & Greeley*, 2015 Colo. Dist. LEXIS 833, *1 ("Plaintiff's stubborn and repetitious filing of multiple motions for reconsideration supports a finding of bad-faith and of substantially vexatious and frivolous conduct."); *Spring Creek Ranchers Ass'n v. McNichols*, 165 P.3d 244, 246 (Colo. 2007) (awarding fees where plaintiff's "stubborn litigiousness" during trial unnecessarily "lengthened

the water court proceeding”). Accordingly, the City seeks fees for Mr. Sutherland’s frivolous post-dismissal conduct.

I. Mr. Sutherland’s substantially frivolous post-dismissal conduct

Mr. Sutherland’s post-dismissal conduct evinces a systematic disregard for the evidence presented and the applicable law. “A claim is substantially frivolous if the proponent can present no rational argument based on the evidence or law in support of that claim or defense.” *City of Aurora ex rel. Util. Enter. v. Colorado State Eng’r*, 105 P.3d 595, 620 (Colo. 2005), *as modified on denial of reh’g* (Feb. 14, 2005). Accordingly, Mr. Sutherland’s conduct is substantially frivolous.

Mr. Sutherland initiated this proceeding by filing a complaint against the City to void the largest bond offering in the City’s history. This court dismissed Mr. Sutherland’s frivolous complaint because he lacked standing. Specifically, Mr. Sutherland failed to allege an injury-in-fact. After the dismissal of Mr. Sutherland’s frivolous complaint, the City filed a motion to recover its attorneys’ fees and costs. *See* 09/26/18 The City of Fort Collins’ Combined Motion for Attorney Fees and Bill of Costs. Mr. Sutherland then requested a hearing on the motion. At the hearing, Mr. Sutherland’s frivolous conduct continued. Rather than demonstrating a rational basis for an injury, Mr. Sutherland simply continued to stubbornly litigate his “novel theory” of standing.

Once the Court issued its order granting the City’s fee request (*see* 04/02/19 Order Granting Fort Collins’ Motion for Attorneys’ Fees and Bill of Costs), Mr. Sutherland began papering the City with frivolous motions.

1. First, Mr. Sutherland filed a Rule 60(b) motion to vacate his dismissal. *See* 03/06/19 Motion to Vacate Order Granting Defendant's Motions to Dismiss as to City of Fort Collins, Steve Miller and Irene Josey Pursuant to Rule 60(b).

2. Before the Court denied Mr. Sutherland's first Rule 60 motion, he filed a second motion seeking to amend the judgment against him under Rule 59. *See* 04/16/19 Motion for Amendment of Judgment Granting City of Fort Collins' Motion for Attorneys' Fees and Bill of Costs Pursuant to C.R.C.P. 59.

3. Less than a week later, Mr. Sutherland filed a Rule 62 motion to stay the enforcement of the City's judgment. *See* 04/22/19 Motion to Stay Enforcement of Judgments Pursuant to CRCP Rule 62.

4. After the Court denied Mr. Sutherland's first Rule 60 motion (*see* 04/16/19 Order Denying Motion to Vacate Order Granting Attorney Fees) Mr. Sutherland withdrew his motion under Rule 59 and admitted that it was "likely prepared and filed with an incorrect understanding of the law." 05/09/19 Unopposed Motion to Withdraw Motion for Amendment of Judgment Granting City of Fort Collins' Motion for Attorney's Fees and Bill of Costs Pursuant to C.R.C.P 59, at 1). But, rather than simply requesting that the Court grant the withdraw of his Rule 59 motion, Mr. Sutherland requested to both withdraw his motion and to entertain his post-dismissal "novel theory" of standing. And so, the City even had to respond to his motion to withdraw.

5. Finally, Mr. Sutherland filed another Rule 60 motion, this time arguing that Judge Lammons lacked authority over this case. *See* 05/02/19 Motion to Deem this Proceeding *Coram Non Judice* Since June 23, 2018 Pursuant to Rule 60(b)(5).

None of Mr. Sutherland's post-dismissal motions were successful; nevertheless, the motions and the hearing unreasonably and unnecessarily imposed significant costs on the City.

Mr. Sutherland knew that his complaint was dismissed because he failed to demonstrate a cognizable injury. And yet, none of his post-dismissal motions addressed his lack of injury. Instead, he simply rehashed the same position: that the Court should have implied a cause of action in his complaint based on a "novel theory" of standing. The Court rejected this argument in its order granting the City's first motion for fees and costs. There, the Court found: "There is no properly pled claim setting forth Plaintiff's novel legal theory regarding standing. Plaintiff has repeatedly characterized his claim as one for declaratory judgment. However, Plaintiff never sought declaratory judgment to reconcile the nonclaim statute with Colorado standing law." 04/02/19 Order at pp. 4-5. Despite this unambiguous rejection, Mr. Sutherland continued to litigate his position.

The only motion Mr. Sutherland filed that did not directly relate to his "novel theory" of standing was his motion to vacate the entire district court proceeding under the theory of *coram non judice*. This motion was substantially frivolous in both substance and form. The motion was frivolous in substance because Mr. Sutherland staked out the absurd position that a qualified, non-recused district court judge had no authority to adjudicate this case. The motion was frivolous in form because Mr. Sutherland noticed the exact same argument in his Notice of Appeal, which divested the Court of its jurisdiction to adjudicate the motion. Mr. Sutherland made no attempt to determine whether he could both appeal his *coram non judice* argument and file a motion to the district court. Further, when the Court alerted Mr. Sutherland that it did not have jurisdiction to hear his motion (*see* 5/23/19 Order Denying Motion to Stay Enforcement of

Judgments) he did not withdraw the motion. Consequently, the City was still forced to respond to his frivolous motion. *See* 5/23/19 City of Fort Collins’ Response to Plaintiff’s Motion to Deem this Proceeding *Coram Non Judice* Since 6/23/18 Pursuant to Rule 60(b)(5).

This post-dismissal conduct has unnecessarily expanded the scope of this litigation without any legitimate purpose. Mr. Sutherland’s conduct simply harasses the City with meritless and vexatious litigation that unfairly drives up the costs associated with this litigation. His frivolous conduct has been evident since he filed his complaint and he should not be permitted to abuse the judicial process with impunity. Accordingly, a second award of attorneys’ fees and costs should be awarded against Mr. Sutherland.

II. The City’s requested fees and costs

A party seeking an award of attorneys’ fees shall file a motion with the Court explaining (1) the basis upon which the fees are sought; (2) the amount of fees sought; and (3) the method by which those fees were calculated. *See* C.R.C.P. 121 § 1-22(2)(b). The moving party shall also provide supporting documents to demonstrate how the attorneys’ time was spent and the reasonableness of the fees sought. The basis for the City’s fees and costs is C.R.S. § 13-17-102(4). The total amount of fees and costs requested is \$40,848.66. A breakdown of the fees and costs is as follows:

<u>INVOICE DATE</u>	<u>INVOICE NO.</u>	<u>COSTS</u>	<u>FEES</u>	<u>TOTAL</u>
February 28, 2019	751828	\$43.62	\$3,024.00	\$3,067.62
March 25, 2019	753439	108.78	26,914.50	27,023.28
April 23, 2019	756158	807.71	4,891.50	5,699.21
May 24, 2019	758850	80.43	4,978.12	5,058.55

June 19, 2019	760807	292.59	4,331.25	4,623.84
	<u>TOTAL:</u>	<u>\$1,333.13</u>	<u>\$44,139.37</u>	<u>\$45,472.50</u>

III. The reasonableness of the City’s fees and costs

The proper starting point to determine a reasonable amount of fees is by calculating the lodestar amount. *Am. Water Development, Inc. v. City v. Alamosa*, 874 P.2d 352, 386 (Colo. 1994). The lodestar amount represents “the number of hours reasonably expended on the litigation multiplied by a reasonable hourly rate.” *City of Wheat Ridge v. Cervený*, 913 P.2d 1110, 1127 n.5 (Colo. 1996) (quoting *Hensely v. Eckerhart*, 461 U.S. 424, 433 (1983)). Here, the City calculated its reasonable attorneys’ fees using the loadstar method. See **Exhibit A**, Second Supplemental Affidavit of John W. Mill (“Mill Aff.”), at ¶ 26.

After the loadstar amount is calculated, courts evaluate the amount requested in light of the factors outlined in C.R.S. § 13-17-103. These 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 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.

Id.

All of these factors favor a judgment of attorneys' fees against Mr. Sutherland.

Mr. Sutherland's efforts to determine the validity of and mitigate his improper conduct (factors a & b)

Mr. Sutherland knows that his conduct is frivolous and has made no attempts to mitigate or otherwise cease his sanctionable behavior. On the contrary, he engaged in frivolous conduct whenever possible. For example, less than two days before the hearing on the City's previous fees motion, he filed five subpoenas compelling certain City personnel to attend the hearing and produce documents. After the City motioned to quash the subpoenas, Mr. Sutherland admitted to the City's counsel that he knew that he had no basis to issue the subpoenas by stating: "As I mentioned before there is no point to quashing the subpoenas. The materials that were listed for production do not exist. That is the whole point." See **Exhibit B**, 03/14/19 E-mail from E. Sutherland to R. Loehr (ellipsis in original). This type of conduct is part-and-parcel of Mr. Sutherland's abuse of the judicial process—he takes advantage of the right to request a hearing only to then bombard the City with vexatious motions that he admits are completely baseless.

Further, his conduct during the fees hearing was consistent with other litigants whose stubborn litigiousness has necessitated a fee award. In *Spring Creek Ranchers Ass'n v. McNichols*, the district court awarded fees when, among things, the litigant unnecessarily "lengthened the water court proceeding" by "continu[ing] to relitigate a settled issue" during the trial. 165 P.3d at 246. The Colorado Supreme Court affirmed the fee award. Mr. Sutherland's

conduct at the fee hearing was similar. Mr. Sutherland admitted during the hearing that he was familiar with the requirement of standing and then made no attempt to demonstrate an injury-in-fact. Instead, he used the hearing as an opportunity to pontificate as to his novel theory of standing and relitigate a settled issue in the case.

Issues of fact in conflict and availability of facts (factors c & f)

There is no factual dispute as to Mr. Sutherland's lack of injury. Since the inception of this litigation, Mr. Sutherland has known that he needed standing in order to bring his lawsuit. Mr. Sutherland then ignored the requirement of standing and filed his complaint regardless.

The Court has made it abundantly clear that Mr. Sutherland has not demonstrated any injury and none of Mr. Sutherland's post-dismissal conduct has set forth facts demonstrating a cognizable injury. Instead of confronting his lack of injury, Mr. Sutherland repeatedly asserted that the Court should have implied a cause of action in his complaint. Even if the Court were to recognize a valid cause of action in Mr. Sutherland's complaint, his post-dismissal motions would still fail because he did not demonstrate injury and, therefore, he has had no standing.

Relative financial positions of the parties (factor d)

Mr. Sutherland's never-ending frivolous litigation tactics created a meaningful and wholly unnecessary financial burden on the City's taxpayers, whose median household income is \$60,110. See U.S. Census Bureau, QuickFacts Fort Collins city, Colorado, U.S. DEPARTMENT OF COMMERCE, <https://www.census.gov/quickfacts/fortcollinscitycolorado> (last visited July 19, 2019). The taxpayers of Fort Collins approved the challenged broadband revenue bonds with overwhelming support and it would be unjust to require the City to finance Mr. Sutherland's farcical attacks on the voter-approved initiative. See **Exhibit C**, voter approval of broadband

initiative.

Mr. Sutherland's bad faith (factor e)

The Court should take note, as it did in its previous order granting fees, that this case is part of Mr. Sutherland's broader campaign to malign the City for implementing the will of its voters. *See* 04/02/19 Order at 6 ("Plaintiff has shown a pattern of challenging measures by the City of Fort Collins. . . A different judge in the Eighth Judicial District recently found that 'Mr. Sutherland's frivolous and vexatious litigation activity constitutes a serious abuse of civil process.'"). Mr. Sutherland is currently subject to a permanent injunction that bars him from filing any more pro se suits in the Eighth Judicial District without permission from the courts.

Mr. Sutherland's litigation correspondence to the City and its counsel is also indicative of bad faith. Mr. Sutherland repeatedly sends aggressive and argumentative communications to the City and its counsel, sometimes with the sole purpose of insulting the City's counsel. *See, e.g., Exhibit D*, 05/07/19 Email from E. Sutherland to R. Loehr (wherein Mr. Sutherland states: "You [Ms. Loehr] are apparently unschooled in law and the procedural history of this case. . . Thank heavens for the First Amendment. It will survive your [Ms. Loehr's] ignorance. . ."). The City should not be forced to endure Mr. Sutherland's misconduct in this litigation without an additional award of fees and costs against Mr. Sutherland.

The extent to which the City prevailed (factor g)

The City prevailed on its previous fees motion and further prevailed on every post-dismissal motion that the Court adjudicated—even when granting Mr. Sutherland's motion to withdraw, the Court agreed that it would not consider the arguments raised in the withdrawn

motion.

The City's multiple offers of settlement (factor h)

The City has made multiple offers of settlement to Mr. Sutherland. *See* Mill Aff, at ¶ 16. In each settlement, the City offered to refrain from collecting its fee award against Mr. Sutherland if he would, among other things, cease litigating the present case. *Id.* Mr. Sutherland refused every offer of settlement. *Id.* Mr. Sutherland's refusal to settle this matter—even when the City was willing to forsake its fee award—forced the City to continue spending taxpayer money to litigate this frivolous suit.

IV. The reasonableness of the City's attorneys' rates

In addition to the C.R.S. § 13-17-103 factors, courts may—but are not required to—consider the rates customarily charged in the locality where the litigation takes place. *See Crow v. Penrose-St. Francis Healthcare Systems*, 262 P.3d 991, 998-99 (Colo. App. 2011) (“Although Colorado case law is clear that a district court may consider the fees customarily charged in the locality where the litigation takes places, doctor has cited no case law, and we have found none in Colorado, holding that a district court *must* consider the local rates when determining the reasonableness of the fees requested.”) (emphasis in original). Further, because the City has met its *prima facie* burden of demonstrating reasonableness through the attached detailed billing records, an affidavit from counsel, and other supporting documentation, Mr. Sutherland now bears the burden of demonstrating why the fees are unreasonable. *See id.* The City does not have any evidence rebutting the reasonableness of the rates charged by its outside counsel in this case because it could not ascertain a custom rate charged by Larimer County attorneys that is specific to this type of municipal litigation (*see* Mill Aff. at ¶ 24); however, the

City notes that this Court did reduce the requested rates from its previous fees motion.

Nevertheless, the City has submitted evidence that the requested rates are reasonable, and absent rebuttal evidence from Mr. Sutherland, the Court should accept the requests rates as reasonable.

CONCLUSION

The City respectfully requests that the Court award additional attorneys' fees and costs in favor of the City, and against Mr. Sutherland, as follows:

\$44,139.37	Attorneys' Fees
<u>\$1,333.13</u>	<u>Costs</u>
\$45,472.50	Total

The City also requests that the Court require Mr. Sutherland to pay interest on the amount of the award until paid in full. See C.R.S. § 5-12-102(1)(b), C.R.S.

Dated this 25th day of July, 2019.

SHERMAN & HOWARD L.L.C.

s/ Rosemary A. Loehr
Rosemary A. Loehr (#52559)
John W. Mill (#22348)

Attorneys for the City of Fort Collins

CERTIFICATE OF SERVICE

I certify that on the 25th day of July, 2019, a true and correct copy of the foregoing **CITY OF FORT COLLINS' SECOND MOTION FOR ATTORNEYS' FEES AND COSTS** was filed via Colorado Court's E-Filing system, and was served on the following:

Eric Sutherland, *pro se*
3520 Golden Currant Boulevard
Fort Collins, CO 80521
(*By email and US Mail*)

Eric R. Burris, Esq.
Jesse Daniel Sutz, Esq.
Chloe Mickel, Esq.
Brownstein Hyatt Farber Schreck, LLP
410 Seventeenth Street, Suite 2200
Denver, CO 80202
(*By Colorado Court's E-Filing*)

/s/ Patricia Rendoff
Patricia Rendoff, Legal Secretary