EXHIBIT 1 REPLY ISO MOTION TO DISCONTINUE

Attached filed: + further Conference on Motion to discontinue hearing on 12/13

2018CV30567

From: Eric Sutherland (sutherix@yahoo.com)

To: jmill@shermanhoward.com; jduval@fcgov.com; rloehr@shermanhoward.com

Cc: cdaggett@fcgov.com

Date: Wednesday, December 11, 2019, 11:14 PM MST

Ms. Loehr,

Please find attached a motion and a proposed order that were filed today at 4:30 at the courthouse along with Exhibit 1 which is the attached transcript. Your last email to me was not recieved in time for me to make changes to the certification.

I understand your distinction as you have described it below, but do not believe that it makes a difference. I have motioned the court to discontinue the hearing. The pactical effect of the court granting this motion is that no hearing will be held and the court will be free to draw its own factual conclusions to meet whatever objectives it wishes ... just like before .... which is what it would do anyway.

Here is the certification paragraph from the motion:

> ***Certification of Conference:*** *Plaintiff has requested the position of the City of Fort Collins' with respect to the instant motion. The City is the only party with business before the court at this time. The City initially indicated that the relief requested is not opposed with the understanding that this motion does not request that the hearing be continued to a later date. Further conference via email clarified for the city that the Motion is made under duress due to the bad faith litigation tactics of the city and this court's admission that it has, on a previous request for sanctions that was granted, admitted that it contrived factual conclusions to fit predetermined outcomes.*

If you do not believe that my representation of the conference was accurate, I would be happy to change it by amendment tomorrow.

I note here that in this conference, the City has not stated that it has no intention to go back for thirds. I can't afford that liability.

I regret foregoing my right to a hearing, but I can't see any other choice. Of course, I would not forego a hearing save for the circumstances that exist. "Simply withdrawing", as you put it, is not an option even though it would have the same effect.

Eric Sutherland

On Wednesday, December 11, 2019, 03:10:10 PM MST, Loehr, Rosemary Ann <rloehr@shermanhoward.com> wrote:

Mr. Sutherland:

The City does not oppose a motion wherein you simply (1) withdraw your request for a hearing and (2) consent for the Court to decide the City's Second Motion for Attorneys' Fees on the previously filed motion, response, reply and corresponding exhibits.

This is the specific motion/relief that the City does not oppose. The City does not authorize you to represent to the Court that your motion is unopposed if you motion deviates from the above description in any way.

Thus, if your motion requests relief that is different than the relief described above, the City may oppose your motion and request the Court to move forward with the hearing. Likewise, if your motion contains new allegations (such as the allegations of "duress") or otherwise raises issues, allegations, or evidence that may require a response from the City, the City may oppose your motion and request the Court to move forward with the hearing.

The City will continue to prepare for the hearing. The City will also plan on attending the hearing unless and until there is an order from the Court vacating the hearing.

Thanks,

Rosemary

Rosemary A. Loehr - *Associate*

633 Seventeenth Street, Suite 3000, Denver, Colorado 80202
Direct: 303.299.8162
rloehr@shermanhoward.com | www.shermanhoward.com

From: Eric Sutherland [mailto:sutherix@yahoo.com]
Sent: Tuesday, December 10, 2019 11:42 AM
To: Mill, John W. <JMILL@shermanhoward.com>; John Duval <jduval@fcgov.com>; Loehr, Rosemary Ann <RLoehr@shermanhoward.com>
Subject: Re: Conference on Motion to discontinue hearing on 12/13

Ms. Loehr,

Just to be clear, my motion requests that the hearing be discontinued under duress resulting from systematic bad faith litigation on the part of the city combined with a trial court that has admitted that it contrives factual conclusions to fit predetermined outcomes. See *Order Denying Plaintiff's Motion For Disqualification* at p.2. "necessary to the resolution".

That *Order* references a hearing in which the Plaintiff testified. I intend to submit the attached file as evidence and state tha the court may take notice of that testimony in consideration of the 2nd Motion for Fees.

The testimony clearly contradicts the position of the city on a number of statements it has made in bad faith in pursuit of its litigation strategy. The testimony, along with other signed pleadings filed in the court, clearly shows that I had a rational basis to file the claim against the city when I did. Any allegation that the 1st hearing was requested for improper purposes or that no rational basis existed to request and participate in the 1st hearing is, itself, groundless and frivolous.

May I conclude that the City does not object to my Rule 60 motion alleging imminent risk of injury because the facts do not support a conclusion of imminent risk of injury? And that the opposition to the motion has some other basis? Previously, John Duval had written that such a motion would be frivolous due to jurisdictional issues. I have asked several officials point blank whether or not there is reason for concern. When making these inquiries, I had the expectation that if my understanding of the facts is incorrect or misleading, I would be so appraised. I have not been so appraised. I have received only one response that may be treated as a position of the city; "Connexion is still in Year 1 of the business plan". There is no reading of the business plan that would support this conclusion. Rather, at its most general, the business plan forecasts significant revenues within one year of commencing construction on the project. Those revenues have not materialized and can not be expected to materialize in the near future.

In other words, if the City believes that my understanding of the facts is incorrect or misleading and, therefor, a Rule 60 motion would be frivolous, a statement to that effect and a short explanation of my error would, at this juncture, improve judicial efficiency and maybe have some other desired effects.

Eric Sutherland

On Tuesday, December 10, 2019, 10:51:44 AM MST, Loehr, Rosemary Ann <rloehr@shermanhoward.com> wrote:

Mr. Sutherland:

Regarding your request to discontinue the hearing, if you intend to file a motion withdrawing your request for a hearing and permitting the court to decide the City's Second Motion for Attorneys' Fees on the City's motion/reply and your response, then the City does not object. But if you intend to seek a continuance of the currently scheduled hearing, then the City objects.

Regarding the additional motions your propose:

The City opposes your motion to "refrain from deciding the 2nd motion for fees" until you have put forth additional evidence on the City's broadband initiative.

The City opposes your Rule 60 motion that would allege a "threat of imminent injury" and ask "for a hearing on standing and the merits."

Thanks,

Rosemary

Rosemary A. Loehr - *Associate*

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From: Eric Sutherland [mailto:sutherix@yahoo.com]
Sent: Monday, December 09, 2019 3:43 PM
To: Mill, John W. <JMILL@shermanhoward.com>; John Duval <jduval@fcgov.com>; Loehr, Rosemary

Ann <RLoehr@shermanhoward.com>
Subject: Conference on Motion to discontinue hearing on 12/13

Please provide the city's position on a motion to discontinue the hearing scheduled for 12/13. As described in a previous email, I am deprived of the right to contravene the City's motion for fees due to financial considerations. I can't afford to be hit with yet another motion for fees because I elected for a hearing in order to challenge the last one. I do not believe that a party places himself or herself in jeopardy by exercising his or her right to a hearing on sanctions, but the City apparently thinks otherwise and the trial court has proven itself to be predictabley biased and unconcerned with the rights of litigants and citizens alike.

I will be including a transcript of my testimony in the first hearing as an exhibit.

According to the City, citizens have no rights to petition government for of grievances ... and any sub-division of state government can create public debt in disregard of any and all laws (save for having held an election) without any fear of challenge, just as long as no person can prove imminent risk of injury within days of an act of issuance.

Due to the weakness of the SPSA, a local government need not prevail in an election in order to create debt repayable with tax revenue ... it merely needs to hold an election consistent with the requirements of TABOR. It can loose the election and the non-claim statute would still operate to bar a challenge. see 11-57-202 and -204.

Also according to the City, anyone brazen enough to stand up and assert a first amendment right at the only time he or she may do so has filed a frivolous lawsuit.

I will also be asking the court to refrain from deciding the 2nd motion for fees until such time as it has considered Connexions failure to launch and the growing headwinds with which it is unprepared to deal with.

At this point, it appears that the Court of Appeals will be dismissing appeal no. 2019CA800 without prejudice.

I will be filing a Rule 60 motion alleging threat of imminent injury and asking for a hearing on standing and the merits.

- Failure of Connexion to acheive even 10% of forecast subscribers, revenues on residential side.

- Failure of Connexion to acheive even .001% of commercial and so-called 'high use" customers.

- Failure of Connexion to demonstrate ability to increase subscribers and revenues at rates A) forecast in the business plan B) necessary to cash flow the enterprise.

- Falure of business plan to accurately estimate the number of the potential subscribers that Connexion could plausibly offer service to leading to misunderstanding of what 'take rate' is necessary.

- Failure of business plan to consider and forecast for reduction in subscriber base. Not all subscribers will remain Connexion subscribers in the future competive market.

- Failure of the business plan to consider and plan for significant price drops by competitors.

- Failure of the business plan to accurately understand 5g wireless data services and appropriately adjust expectations for market share by factoring competition from 5g into forecasts for market share.

- Failure of the City to capitalize on new construction opportunities to build out the network inexpensively in a manner similar to competitors and bring future customers who enter the market for the first time on line for pennies on the dollar.

Second tier (contribute to first tier issues).

- Failure of Connexion to achieve 70 % of forecast goals for "passing" potential customer sites.

- Failure of Connxion to demonstrate cost per residence passed in line with business plan expectations.

- Failure of Fort Collins Utilities to bring Customer Information System on line prior to launch of Connexion requiring difficult integration of Connexion and Water/Electric to achieve single source delivery of services and eroding all credibitliy of the city in terms of fulfilling promises to ratepayers.

In total, the evidence shows more than what is required to meet the standard of threatened injury in a declaratory action ... and the action was filed in advance of the 30 day non-claim statute. All electric utility ratepayers are entitled to the relief I have sought.

Eric Sutherland

On Friday, December 6, 2019, 08:52:03 PM MST, Eric Sutherland <sutherix@yahoo.com> wrote:

Ms. Loehr,

I do not consider it prudent to continue on with lawless, groundless activities in the court. Your evidence list makes it ummistakably clear that the City intends to engage in lawless and groundless activities. My rights under the law allow me options that I choose to exercise now.

It is settled law; a party has a right to a hearing in any instance where costs or fees are requested of the court. It is clear that the City believes that the exercise of that right submits a party to further sanction. It is clear that the City believes that the law allows for a recursive process whereby a request for a hearing leads to incurrence of additional fees, which can lead to another request for fees, which, although a party has a right to do so, leads to another hearing in which further attorneys fees may be incurred and subsequently submitted to the court with a request for yet another award, which, although a party has a right to do so ....

If any party had any idea that his request for a hearing on costs and fees would expose him or her to further requests for attorneys fees, it would have a chilling effect. Such is the case here. I simply can't afford to risk another dollar, especially considering the fact that Judge Lammons has cemented evidence of his bias in his Order denying my Motion for Disqualification. It may not be questioned at this point; Judge Lammons will

disregard any argument or fact that controverts the City's position and will decide the 2nd motion for fees in favor of the City no matter what the law requires. Thereafter, it is only a matter of time before he City comes forward with its 3rd motion for fees.

Consequently, I believe that I must rely upon authority that holds that no party need further jeopardize himself or herself in the face of manifest injustice and legal traps when doing so only subjects him or her to further loss.

Consequently, I will be preserving my position for appellate review.

Eric Sutherland

On Friday, December 6, 2019, 05:04:36 PM MST, Loehr, Rosemary Ann <rloehr@shermanhoward.com> wrote:

Mr. Sutherland,

The City stated its position for attorneys' fees in its Second Motion for Attorneys' Fees. The December 13, 2019 hearing is being held at your request. Per the Court's Order granting your Motion for a Hearing, the hearing is "limited in scope to the reasonableness and necessity of the fees requested in the City's July 25 motion."

Thanks,

Rosemary

Rosemary A. Loehr - *Associate*

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From: Eric Sutherland [mailto:sutherix@yahoo.com]
Sent: Friday, December 06, 2019 3:19 PM
To: Loehr, Rosemary Ann <RLoehr@shermanhoward.com>; Mill, John W. <JMILL@shermanhoward.com>; John Duval <jduval@fcgov.com>
Subject: regarding hearing on 12/13

Could you please explain what the City's intent at this hearing is? There is no differentiation or assignment of any of the fees requested with any of the various activities complained of. Is this an all-or-nothing request?

For example, the trial court has declined to rule on the coram non judice issue. Yet you seem to be alleging that my preservation of the issue for appeal in the form of a motion merits an award of attorneys fees for having to have responded without disaggragating what fees were charged for this purpose.

Similarly, the entire first hearing was requested specifically to preserve argument that my new theory of law was supported by fact and a cognizable basis in existing law. Here again, neither I or the court will have any idea what fees were charged for participating in the hearing.

Thank you,

Eric Sutherland

Motion_Discontinue Hearing.pdf
330.3kB

Proposed Order Motion_Discontinue Hearing.doc
40.5kB

2018CV149 Sutherland v City of Fort Collins et al 3.15.19.pdf
287kB