DISTRICT COURT, COUNTY OF LARIMER, STATE OF COLORADO Court Address: 201La Porte Ave, Suite 100 Ft. Collins, CO 80521	DATE FILED: March 11, 2016 5:16 PM FILING ID: 393DFCE3D7956 CASE NUMBER: 2015CV30938
Plaintiff: BUCK 2ND, LLLP, a Colorado limited liability partnership v. Defendant: CITY OF LOVELAND, COLORADO, a municipal corporation,	**COURT USE ONLY**
Attorneys for Plaintiff: Erich L. Bethke, #17299 Charles E. Fuller, #43923 Senn Visciano Canges, P.C. 1700 Lincoln Street, #4500 Denver, CO 80203 303-298-1122 EBethke@sennlaw.com; CFuller@sennlaw.com	Case Number: 2015CV30938 Division/Courtroom: 5B

MOTION FOR LIMITED DISCOVERY, TO EXTEND TIME FOR FILING SUMMARY JUDGMENT RESPONSE BRIEF, AND FORWITH CONSIDERATION

Buck 2nd, LLLP ("Buck 2nd"), by its undersigned counsel, respectfully submits this Motion for Limited Discovery (the "Discovery Motion") and states the following:

Certification per C.R.C.P. Rule 121, § 1-15(8): Undersigned counsel communicated with the City Attorneys for the City of Loveland (the "City") in an effort to informally resolve this Discovery Motion. The City Attorney stated that she did not believe discovery was necessary and that the City opposes this Discovery Motion.

1. The Court's February 24, 2016 Order Regarding Defendant's Motion to Dismiss ("Order") found "that the applicability of the statute of limitations is determinative" and stated to both parties that it intended to convert the City's C.R.C.P. 12(b)(5) Motion to Dismiss into a C.R.C.P. 56 Motion for Summary Judgment on such issue. The Court instructed both parties to expeditiously "supplement the pleadings."[1]

2. Without any discovery, Buck 2nd believes it will be prejudiced in its ability to confront the City's purported new "facts" in both the City's Motion to Dismiss and its anticipated Summary Judgment Motion (the City has already proffered new, purported "facts" that no funds were ever "appropriated" for the repayment of Buck 2nd despite the

[1] The City has "until March 16, 2016" to supplement its C.R.C.P. 12(b)(5) Motion to Dismiss for Summary Judgment with additional facts/evidence, Buck 2nd has until March 30, 2016 provide its Response (with "facts" it can garner at this preliminary stage), and the City's Reply is due April 4, 2016.

City's prior, official appropriation documentation). Buck 2nd anticipates similar new "facts" in the upcoming briefing for which limited discovery is needed to test such "facts."

3. C.R.C.P. 12(b) provides in relevant part:

> If, on a motion asserting the defense numbered (5) to dismiss for a failure of the pleading to state a claim upon which relief can be granted, matters outside the pleading are presented to and not excluded by the court, the motion shall be treated as one for summary judgment and disposed of as provided in C.R.C.P. 56, **and all parties shall be given reasonable opportunity to present all material made pertinent to such a motion by C.R.C.P. 56**.

(Emphasis added).

4. Although the Court's Order provided notice of the conversion and a short window for the parties to file supplemental pleadings, there has been no opportunity for discovery and hence no opportunity for Buck 2nd "to present all material made pertinent to such [supplemental summary judgment pleadings] by C.R.C.P. 56."

5. Importantly, C.R.C.P. 56(f) authorizes this Court to order that discovery be taken on the issues to be addressed in the supplemental pleadings, providing:

> "Should it appear from the affidavits[2] of a party opposing the motion [for summary judgment] that the opposing party cannot for reasons stated present by affidavit facts essential to justify its opposition, the court may refuse the application for judgment **or may order a continuance to permit affidavits to be obtained or depositions to be taken or discovery to be had** or may make such other order as is just." (Emphasis added).

6. Buck 2nd respectfully submits that based upon applicable Rules, case law and principals of fairness, that there is a need for limited discovery pursuant to C.R.C.P. Rules 12 and 56(f).

7. Indeed, Buck 2nd respectfully suggests that *it would constitute reversible error* for this Court to preclude any and all discovery when Buck 2nd is confronted with the "drastic" remedy of summary judgment[3] with not opportunity for discovery and

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[2] In compliance with Rule 56(f) attached hereto as **Exhibit "A"** is the Affidavit of undersigned counsel of Buck 2nd in support of the limited discovery requested herein.

[3] "[S]ummary Judgment is a drastic remedy and should only be granted if there is a clear showing that no genuine issue as to any material fact exists and the moving party is entitled to judgment as a matter of law." *Cyprus Amax Minerals Co. v. Lexington Ins. Co.*, 74 P.3d 294, 298 (Colo. 2003). "Courts grant the nonmoving party all favorable inferences that may be drawn from uncontested facts, and resolve any doubt as to whether a triable issue of material fact exists against the moving party." *Id.*

factual development to demonstrate the material and disputed facts that surround the allegations of its Complaint.

8. Similar to the mandatory language/requirement under C.R.C.P. 12 that parties be given the opportunity to discover and present all relevant evidence, Colorado court decisions addressing conversion from a motion to dismiss into a motion for summary judgment under Rule 12 recognize the need for additional discovery in such circumstances. *See, e.g.*, *Anglum v. USAA Prop. & Cas. Ins. Co.*, 101 P.3d 1103, 1104 (Colo. App. 2004) (explaining trial court converted motion to dismiss into a motion for summary judgment and provided "a period of limited discovery" before requiring "the submission of supplemental briefs"), *rev'd on other grounds in USAA Cas. Ins. Co. v. Anglum*, 119 P.3d 1058 (Colo. 2005); *see also Jenkins v. Panama Canal Ry. Co.*, 208 P.3d 238, 240 (Colo. 2009) (trial court converted motion to dismiss to motion to summary judgment after "a fairly contentious discovery period").

9. This Court should also give deference to the clear and analogous federal authority on this issue. *Trinity Broadcasting of Denver, Inc. v. City of Westminster*, 848 P.2d 916, 924 (Colo. 1993) (because C.R.C.P. 12(b)(5) is identical to Fed. R. Civ. P. 12(b)(6), Colorado courts "look to federal authorities for guidance in construing" C.R.C.P. 12(b)(5)).

10. Under analogous federal authority, once the decision to convert a motion to dismiss into a motion for summary judgment is made, "reasonable allowance must be made for the parties to obtain discovery." *Guidotti v. Legal Helpers Debt Resolution, L.L. C.*, 716 F.3d 764, 775 n.6 (3d Cir. 2013) (emphasis added); *E.I. du Pont de Nemours & Co. v. Kolon Indus., Inc.*, 637 F.3d 435, 448 (4th Ci r.2011) (same). *Compare Kurdyla v. Pinkerton Security*, 197 F.R.D. 128, 131 (D.N.J. 2000) ("A court should not convert a motion, however, when little or no discovery has occurred."); *Brug v. Enstar Grp., Inc.*, 755 F. Supp. 1247, 1251 (D. Del. 1991) ("[I]t would be inappropriate to convert the motion to dismiss into a motion for summary judgment ... since there has been no discovery conducted in the present case.").

11. To permit conversion to a motion for summary judgment without permitting discovery would "'invite courts to consider facts and evidence that have not been tested in formal discovery.' " *Guidotti*, 716 F.3d at 775 n. 6 (quoting *Pfeil v. State St. Bank & Trust Co.*, 671 F.3d 585, 594 (6th Cir. 2012)). Courts are only permitted to convert a motion for summary judgment without notice and a period for discovery when both parties have already undertaken discovery and submitted attachments/exhibits to their motion to dismiss and/or response. *See, e.g., Burnham v. Humphrey Hospitality Reit Trust, Inc.*, 403 F.3d 709, 714 (10th Cir. 2005) (explaining there was no prejudice when trial court converted motion to dismiss into a motion for summary judgment without providing notice and permitting the parties to discovery and submit countervailing evidence because both parties submitted affidavits).

12. Where the parties have not undertaken discovery and/or one party does not submit attachments/exhibits to their motion to dismiss (or response), *it is reversible error* to convert a motion to dismiss into a motion for summary judgment without first permitting the non-moving party to conduct limited discovery. *See Ohio v. Peterson, Lowry, Rall, Barber & Ross*, 585 F.2d 454, 457 (10th Cir. 1978) (holding trial court committed reversible error by converting a motion to dismiss into a motion for summary judgment without permitting the parties the opportunity to present "all material pertinent to such motion by Rule 56", including "such things as depositions, answers to interrogatories, admission on file, affidavits, and the like."). *See also Brown v. Zavaras*, 63 F.3d 967, 969 (10th Cir. 1995) (explaining that, prior to conversion, the trial court must "give the parties notice of the changed status of the motion and thereby provide the parties to the proceeding the opportunity to present to the court all material made pertinent to such motion by Rule 56" (emphasis added)).

13. Moreover and under Colorado law construing the relevant Rules, Buck 2nd is entitled pursuant to C.R.C.P. 56(f) to take discovery on the issues raised by the Court to be addressed in supplemental pleadings. *See Miller v. First Nat'l Bank*, 399 P.2d 99, 100-01 (Colo. 1965); *Young v. Bush*, 2012 COA 47, ¶¶42-43, 277 P.3d 916, 927.

14. In both *Miller* and *Young*, the Colorado Supreme Court and Court of Appeals, respectively, held that the trial courts abused their discretion in refusing to grant the moving party a reasonable continuance to take discovery in order to respond to a motion for summary judgment. Specifically and as clarified in *Young*, where a party submits the requisite affidavit of counsel stating that additional discovery "would be helpful", and it appears that such discovery might tend to establish the existence of a question of fact for purposes of responding to a motion for summary judgment, a trial court errs as a matter of law if it does not allow such additional discovery. *See Young*, 2012 COA 47, ¶43; *compare Holland v. Bd. of Cnty. Comm'rs*, 883 P.2d 500, 508-09 (Colo. App. 1994) (declining motion for leave to take additional discovery in order to respond to motion for summary judgment because, among other reasons, "the action had been pending for ten months without any discovery activity when the summary judgment motion was filed").

15. In the instant litigation, neither party has undertaken any formal discovery in this matter, and discovery is not permitted under C.R.C.P. 16 because the case is not yet "at issue" (the City has not yet filed an Answer).

16. Moreover, no conduct by Buck 2nd prompted the "conversion" of the City's Motion to Dismiss into summary judgment briefings. Buck 2nd did not attach a single document to its Response to the City's Motion to Dismiss. Rather, it was only the City that attached "materials outside the pleadings" in its Motion to Dismiss to provide some basis for converting this briefing into one for summary judgment. [4]

[4] The fact Buck 2nd attached certain contract documents to its Complaint does not mean that discovery has been undertaken, or that Buck 2nd is in possession of all pertinent materials regarding the accrual of the statute of limitations and equitable tolling issues raised by the Court. A plaintiff's reference to, or incorporation of, materials in a complaint does not convert a

17. It also bears noting that in Buck 2nd's January 8, 2016 Response in Opposition to the City's Motion to Dismiss, Buck 2nd was wary of such a possibility and specifically requested "a reasonable opportunity for discovery" in the event "the Court is inclined to consider the myriad facts that are outside the pleadings and are posed by the City's Motion to Dismiss."

18. Buck 2nd believes that it adequately set forth in its Complaint facts that would support this Court's determination that Buck 2nd's claims are timely asserted based upon: a) the date such claims "accrued" for purposes of the applicable statute of limitations; and b) an equitable tolling of applicable statutes of limitations.

19. However and given the Court's decision to convert to a summary judgment briefing on the "fact-intensive" issues of the accrual and equitable tolling of applicable statutes of limitation, Buck 2nd respectfully submits that it should be afforded limited discovery to, at a minimum, take the depositions of third party witnesses with knowledge of the communications (or lack thereof) between Buck 2nd and the City from 2009 through 2015.

20. Such discovery is necessary to fairly ascertain the existence of triable issues of fact with respect to the accrual of the statute of limitations and equitable tolling defense.

21. " 'Issues such as when a cause of action accrues, whether a claim is barred by a statute of limitations, and whether a statute of limitations should be equitably tolled, are issues of fact.' " *Damian v. Mountain Parks Elec., Inc.*, 2012 COA 217, ¶8, 310 P.3d 242, 244 (quoting *Olson v. State Farm Mut. Auto Ins. Co.*, 174 P.3d 849, 853 (Colo. App. 2007)). *See also Credit Suisse Securities (USA) LLC v. Simmonds*, 132 S.Ct. 1414, 1421 (2012) (accrual and equitable tolling "after all, involve fact-intensive disputes ....").

22. A court errs in granting summary judgment on the basis that a plaintiff's claims are barred by the governing statute of limitations "if there are disputed issues of fact about when the statute of limitations began running." *Colorado Pool Sys., Inc. v. Scottsdale Ins. Co.,* 317 P.3d 1262, 1273 (Colo. App. 2012).

23. Buck 2nd anticipates limited discovery on factual matters related to the applicable statutes of limitations and relevant to Buck 2nd's position. Buck 2nd respectfully submits such discovery will assist the Court in appropriately determining the existence of disputed material facts as to the date that Buck 2nd's claims "accrued" and if such limitation periods were equitably "tolled."[5]

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motion to dismiss into a motion for summary judgment. *See Yadon v. Lowry*, 126 P.3d 332, 336 (Colo. App. 2005).

[5] Among other things, Buck 2nd anticipates conducting limited discovery (including limited written discovery and depositions) regarding: a) the existence or non-existence of the funds that the City previously stated were "appropriated" for payment to Buck 2nd; and b) regarding the City's

24. As this Court is aware, any rulings upon the City's Motion for Summary Judgment will at least involve a determination of: a) the "accrual"; and b) the equitable tolling of the statutes of limitation that are applicable to Buck 2nd's claims.

25. "Both a limitation period and an accrual date are necessary to determine when the statute of limitations on any particular cause of action will run." *BP Am. Prod. Co. v. Patterson*, 185 P.3d 811, 814 (Colo. 2008). If the limitation period for a particular claim has accrued and begun to run, it must also be determined if there is a basis for equitably tolling such time period. *Garrett v. Arrowhead Improvement Ass'n*, 826 P.2d 850, 855 (Colo. 1992).

26. The City ultimately will have the burden to prove "facts demonstrating the accrual of [Buck 2nd's] claims, the applicable statute of limitations, and its expiration prior to the filing of the[ ] suit[ ]." *Crosby v. Am. Family Mut. Ins. Co.*, 251 P.3d 1279, 1283 (Colo. App. 2010). If the City is successful in doing so, Buck 2nd then would have the burden to "establish[ ] the factual foundation for equitably tolling the statute of limitations." *Garrett*, 826 P.2d at 855.

27. *It is important for the Court to note that the City has not provided any credible challenge to the timeliness of Buck 2nd's Fourth and Fifth Claims (Account Stated and Declaratory Judgment) since they were filed within the applicable six-year period.*

28. For contract claims covered by the six-year statute of limitations, C.R.S. § 13-80-103.5(1)(a), that involve the recovery of "a liquidated debt or an unliquidated, determinable amount of money due", the limitations period accrues "on the date the debt becomes due." *BP Am. Prod. Co.,* 185 P.3d at 814..

29. "By contrast, all other actions for breach of contract are subject to a three-year limitation period, which does not accrue until the breach is, or reasonably should have been, discovered." *Id.*

30. Because Buck 2nd's Fourth and Fifth Claims were timely brought under the six-year statute of limitations, the date of "accrual' and "equitable tolling" of the three-year statute for the remaining Claims are the only relevant issues.

31. Accrual occurs under the three-year statute of limitations only when the breach is reasonably discovered.

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use and application of any such "appropriated" funds (in lieu of paying Buck 2nd) during the relevant time period. For example, and without limitation, given the City's repeated assurances to Buck 2nd that it had "appropriated" funds to repay Buck 2nd and would do so in the future, the City's application of those appropriated funds elsewhere during the operative time periods is relevant to show the City was not being forthright with Buck 2nd, and such facts Buck 2nd respectfully submits would support the equitable tolling of the statute of limitations.

32. Buck 2nd seeks limited discovery to establish those communications between Buck 2nd and the City with respect to the City's continued promises that funds had already been "appropriated" and that the City would eventually reimburse Buck 2nd. The City's multi-year misrepresentations or non-disclosures concerning such "appropriated funds" all constitute evidence that the three-year statute of limitation did not begin to accrue.

33. The second, pertinent legal issue is equitable tolling and the facts necessary to establish the same. "At times, however, equity may require a tolling of the statutory period where flexibility is required to accomplish the goals of justice." *Dean Witter Reynolds, Inc. v. Hartman*, 911 P.2d 1094, 1096 (Colo. 1996). The doctrine applies when the party asserting statute of limitations as a defense to a claim lied, misled, concealed, or otherwise acted in such a manner as to impede the plaintiff from asserting his or her claims in a timely manner. *See id.* at 1096-97. "The principal underlying equitable tolling … is that a person should not be permitted to benefit from his or her own wrongdoing." *Id.*

34. In the recent Motion to Dismiss, the City now maintains that funds were never appropriated to repay Buck 2nd for the Street Improvements, and that it has the authority to indefinitely postpone making said appropriations and repaying Buck 2nd.

35. Buck 2nd seeks discovery to show disputed material facts concerning the City's representations to Buck 2nd that funds were available and/or that the City failed to disclose that funds had not been appropriated.

36. Buck 2nd relied on such representations and/or non-disclosures in refraining from previously filing suit. Such communications, which Buck 2nd reasonably believes will be shown in depositions and/or are documented in emails, including internal emails on the City's email server, as well as other written documents, would show that the City was saying one thing to Buck 2nd while concealing/affirmatively misrepresenting facts that, if known, would have led Buck 2nd to file suit earlier.

37. In fairness and because Buck 2nd's claims potentially hinge on these "fact-intensive" and critical issues, Buck 2nd should be permitted to take such additional and limited discovery.

38. Buck 2nd respectfully requests seventy-five (75) days from the date of the City's tendering its supplemental summary judgment briefing, unless extended for good cause, to take such additional discovery, and that Buck 2nd be permitted to take depositions and propound reasonable written discovery on matters pertaining to the accrual of the statute of limitations/equitable tolling, as set forth in the Affidavit of undersigned counsel, which is **Exhibit A** hereto.

39. Thereafter, Buck 2nd requests an additional fifteen (15) days after the completion of this discovery to tender its Summary Judgment Response Brief (total

extension of 90 days, unless otherwise extended, from the time the City tenders its supplemental Summary Judgment Motion).

40. Buck 2nd has not waived its right to notice and an opportunity to take discovery to present relevant countervailing evidence. It did not submit any extraneous affidavits or exhibits to its response, and no discovery has occurred. The City is in possession of evidence which is directly relevant to this Court's consideration of the statute of limitations/equitable tolling issues in this case, and Buck 2nd respectfully submits that it would be reversible error for this Court not to allow Buck 2nd the opportunity for limited discovery of the same.

WHEREFORE, Buck 2nd respectfully requests that the Court enter an Order permitting Buck 2nd limited discovery as set forth herein and to extend the time for the filing of Buck 2nd's Summary Judgment Response Brief, all with respect to the issues of application/accrual of the statute of limitations and equitable tolling thereof, and for such other and further relief as the Court deems just and proper.

Dated: March 11, 2016.

SENN VISCIANO CANGES P.C.

*s/ Erich L. Bethke**
Erich L. Bethke, #17299
Charles E. Fuller, #43923

Attorneys for Plaintiff

CERTIFICATE OF SERVICE

This will certify that on this 11th day of March, 2016, a true and correct copy of the foregoing was served via ICCES on the following:

Alicia R. Calderón, Esq.
Laurie R. Stirman, Esq.
Loveland City Attorney's Office
500 E. Third Street, Suite 300
Loveland, CO 80537

**s/ Sherry Russom*
Sherry Russom

**In accordance with C.R.C.P. 121 § 1-26(7), a printed copy of this document with original signatures is being maintained by filing party and will be made available to inspection by other parties or the court upon request.*

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AFFIDAVIT OF ERICH L. BETHKE IN SUPPORT OF REQUEST FOR DISCOVERY PURSUANT TO C.R.C.P. 56(f)

STATE OF COLORADO)
) ss.
COUNTY OF DENVER)

Erich L. Bethke, being first duly sworn and upon oath, deposes and says:

1. I am counsel of record for Plaintiff Buck 2nd, LLLP ("Buck 2nd") in this matter.

2. The Court entered an Order Regarding Defendant's Motion to Dismiss on February 24, 2016 ("Order"). In the Order, the Court converted Defendant City of Loveland, Colorado's (the "City") C.R.C.P. 12 Motion to Dismiss into a Motion for Summary Judgment, and instructed the parties to file supplemental pleadings with respect to the statute of limitations/equitable tolling.

3. No formal discovery has been undertaken in this matter because the case is not yet "at issue". As such, I have not yet been able to depose any City employees or former City employees, or issue any written discovery. While my client did issue a CORA request to the City for information, we received little more than our own email communications with the City Attorney's Offices.

4. Discovery is essential in order to establish material and apparently disputed facts to prove that the governing statute of limitations did not begin to accrue until sometime in 2014/2015, or, in the alternative and if the Court finds the limitations period began accruing earlier, that the City lied, misled, concealed, or otherwise acted in such a manner as to impede Buck 2nd from reasonably discovering that it should assert its claims in an earlier timeframe.

5. Although I have inquired of Buck 2nd as to facts that would support this Court's equitable tolling of the statute of limitations/later accrual of the statute of limitations, and I believe there is such a basis based on my limited inquiries to date, I have not yet had an opportunity to take discovery of the City or third parties and therefore cannot possibly present all of the facts that are relevant to the Court's consideration of the accrual and equitable tolling issues for the converted summary judgment motion. I am concerned that my own client's affidavits may not adequately address all relevant matters and I desire to avoid the risk of relying exclusively upon such affidavits without any formal discovery.

6. I respectfully submit that it Buck 2nd should be afforded the right to take limited discovery before filing a supplemental pleading. I anticipate taking a C.R.C.P. 30(b)(6) deposition of the City to determine the identifies of employees with knowledge/information that may be relevant, and to determine the existence and location of relevant documents. I would also propose to take the deposition of 2-3 City employees and former employees, to establish facts showing the City acted improperly and impeded Buck 2nd from brining claims sooner, and limited written discovery along those same lines.

7. As a suggested offer of proof, and without limitation, it is believed that City employees/former employees will testify at deposition to representing to Buck 2nd in conversations they had with Buck 2nd's principal, John Giuliano, and possibly in written correspondence, that funds had been appropriated for repayment/reimbursement of the Street Improvements, and that the City requested additional time to repay Buck 2nd, always with assurances that the funds were appropriated and that the City would repay Buck 2nd in the reasonable future (instead of in 2023 as recently represented by the City). Buck 2nd worked diligently with the City to accommodate such requests for reasonable extensions and refrained from filing suit in reliance on the City's statements that funds were appropriate and that repayment would reasonably be forthcoming if Buck 2nd would accommodate the City's requests. It was not until 2014/2015 that the City completely reversed its prior position by informing Buck 2nd that funds had never been appropriated; that there was no plan to even begin appropriating funds until 2017; and that full repayment would not occur until 2023 (with caveats that repayment may occur sometime thereafter).

8. I would also request the ability to reasonably probe any evidence tendered by the City in its supplemental summary judgement brief, including confronting adverse witnesses tendering affidavit's in support of the City's position, and seeking additional

discovery regarding any newly disclosed documents/evidence as tendered by the City in its supplemental briefing.

9. Without such an opportunity for discovery, Buck 2nd will not be in a position "to present all material" made pertinent to the recently converted motion as required under C.R.C.P. 12(b), and likewise will risk not having all the "facts essential to justify its opposition" to the City's supplemental pleading as required under C.R.C.P. 56(f).

10. For the forgoing reasons, I respectfully request that the Court delay the briefing schedule to allow Buck 2nd to conduct such limited discovery for a period of 75 days from the date of the City's tendering its supplemental summary judgment briefing and to extend the time for Buck 2nd to file its Summary Judgment Response Brief by 15 days after the completion of such discovery (total extension of 90 days from the time the City tenders its supplemental Summary Judgment Motion).

Dated: March 11, 2016.

SHERRY RUSSOM
NOTARY PUBLIC
STATE OF COLORADO
NOTARY ID 20034037825
MY COMMISSION EXPIRES NOVEMBER 6, 2019

By: Erich L. Bethke

Subscribed and sworn to before me this 11th day of March, 2016, by Erich L. Bethke.

Witness my hand and official seal.

My commission expires: 11-6-2019.

Notary Public