

DISTRICT COURT, LARIMER COUNTY, STATE OF COLORADO 201 La Porte Ave., Suite 100 Fort Collins, CO 80521 Tel: 970-494-3500		<p style="text-align: center;">▲ COURT USE ONLY ▲</p> <hr/> Case No.: 2016cv230 Division: 5C
Plaintiff: LARRY SARNER, an individual, <i>pro se</i> v. Defendants: CITY OF LOVELAND; and ANGELA MYERS, LARIMER COUNTY CLERK AND RECORDER		
<i>Attorneys for Defendant City of Loveland:</i> <div style="display: flex; justify-content: space-between;"> <div style="width: 45%;"> Thomas W. Snyder, #33106 Thomas A. Isler, #48472 KUTAK ROCK LLP 1801 California St. Suite 3000 Denver, CO 80202 Tel: 303-297-2400 Fax: 303-292-7799 thomas.snyder@kutakrock.com thomas.isler@kutakrock.com </div> <div style="width: 45%;"> Alicia R. Calderon, #32296 Assistant City Attorney Loveland City Attorney's Office Civic Center 500 East Third Street, Suite 330 Loveland, CO 80537 Tel: 970-962-2545 Alicia.calderon@cityofloveland.org </div> </div>		
DEFENDANT CITY OF LOVELAND'S MOTION TO DISMISS FOR LACK OF SUBJECT MATTER JURISDICTION		

Defendant, City of Loveland, by and through its undersigned counsel, moves this Court to dismiss this action for lack of subject matter jurisdiction pursuant to C.R.S. § 1-11-203.5(1) and C.R.C.P. 12(b)(1), and states as follows:

1. This action concerns two ballot questions adopted by the Loveland City Council by Ordinance No. 6037. Plaintiff commenced this action challenging the two ballot questions by filing a complaint styled "A Contest Concerning the Form and Content of an Election Ballot Question, and for Enforcement of C.R.S. §1-45-117 Prohibiting the Use of Public Funds for Electioneering." This action is governed by the expedited procedures of C.R.S. § 1-11-203.5.

2. Before the Court may take jurisdiction of Plaintiff's ballot issue contest, Plaintiff "shall file with the clerk of court a bond, with sureties, running to the contestee and conditioned

to pay all costs, including attorneys fees, in case of failure to maintain the contest.” C.R.S. § 1-11-203.5(1). The purpose of this statutory requirement is to ensure that actions without merit are not brought or maintained. This requirement is mandatory and jurisdictional. *Id.* Although the Court has discretion to determine the sufficiency of the bond, the bond must be “sufficient to protect [the defendant’s] interest” in the case. *See Muck v. Arapahoe Cnty. Dist. Court*, 814 P.2d 869, 872 n.8 (Colo. 1991) (analyzing the sufficiency of a supersedeas bond).

3. This Court has repeatedly declined to take jurisdiction of ballot contests until the plaintiff posts a bond pursuant to § 1-11-203.5(1) and its companion statute, § 1-11-213(3). *See Order Declining Jurisdiction, Sutherland v. Bd. of Educ. of Poudre Sch. Dist. R-1*, No. 2016CV225 (filed Aug. 23, 2016) (attached hereto as **Exhibit A**) (requiring a \$8,000 bond); *Order Declining Jurisdiction, Sutherland v. Bd. of Cnty. Comm’rs of Cnty. of Larimer*, No. 2014CV115 (filed Sept. 2, 2014) (French, J.) (attached hereto as **Exhibit B**) (requiring a \$10,000 bond); *Second Order Re Security, Sutherland v. Bd. of Cnty. Comm’rs of Cnty. of Larimer*, No. 2014CV166 (filed Dec. 11, 2014) (French, J.) (attached hereto as **Exhibit C**) (requiring a \$10,000 bond).

4. No bond has been filed in this case. The undersigned represents that attorneys fees in this case will well exceed \$10,000, in addition to costs such as filing fees and potential expert witness fees. Therefore, a bond sufficient to cover “all costs, including attorneys fees” would need to be sufficient to cover all of these likely expenses. *See Sierra Club v. El Paso Gold Mines, Inc.*, No. Civ.A.01 PC 2163 OES, 2003 WL 25265871, at *12 (D. Colo. Apr. 21, 2003) (collecting cases in which bonds of \$35,000 and \$50,000 were required to cover attorneys fees on appeal, and ordering a party to post a bond of \$50,000 to cover costs and attorneys fees). Plaintiff’s failure to post *any* bond is grounds for dismissal for lack of jurisdiction. *See Exs. A–C*.

5. For the foregoing reasons, and consistent with this Court’s prior rulings, Defendant City of Loveland respectfully requests that the Court decline jurisdiction and dismiss this action for Plaintiff’s failure to post a bond. In the alternative, the Court should require Plaintiff to post a bond of at least \$10,000.

Respectfully submitted this 30th day of August, 2016.

KUTAK ROCK LLP

s/ Thomas W. Snyder

Thomas W. Snyder

Attorneys for Defendant City of Loveland

CERTIFICATE OF SERVICE

I hereby certify that on this 30th day of August, 2016, a true and correct copy of the foregoing was served as indicated below on the following:

Served via electronic mail and U.S. Mail, first class postage prepaid:

Larry Sarner
711 West Ninth Street
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larry.sarner@gmail.com
Pro se Plaintiff

Served via ICCES and electronic mail:

Jeannine S. Haag
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*Attorneys for Defendant Angela Myers,
Larimer County Clerk and Recorder*

s/ Angie Rodriguez

EXHIBIT A

District Court, Larimer County, State of Colorado 201 LaPorte Avenue, Suite 100 Fort Collins, CO 80521-2761 (970) 494-3500	DATE FILED: August 23, 2016 3:52 PM CASE NUMBER: 2016CV225	
Plaintiff: ERIC SUTHERLAND, v. Defendant: BOARD OF EDUCATION OF POUDRE SCHOOL DISTRICT R-1, A POLITICAL SUBDIVISION OF THE STATE OF COLORADO; Indispensable Party: ANGELA MYER, LARIMER COUNTY CLERK AND RECORDER	▲ COURT USE ONLY ▲	Case No.: 2016CV225 Courtroom: 3C
ORDER DECLINING JURISDICTION		

Plaintiff Eric Sutherland filed this action challenging the title and content of two ballot issues set by defendant Board of Education of Poudre School District R-1 (“PSD”) for the upcoming election in November, 2016, in Larimer County, Colorado. The procedure for resolving the issues raised by Mr. Sutherland is outlined in C.R.S. §1-11-203.5 which sets forth the following preliminary requirement:

“Before the district court is required to take jurisdiction of the contest, the contestor shall file with the clerk of the court a bond, with sureties, running to the contestee and conditioned to pay all costs, including attorney’s fees, in case of failure to maintain the contest. The judge shall determine the sufficiency of the bond and, if sufficient, approve it.”

Mr. Sutherland submitted a \$50 cash bond and a “Motion to Deem Bond Sufficient.”

PSD has filed a response to the motion to deem bond sufficient which asserts that PSD will likely incur attorney fees exceeding \$50,000 plus costs and expert witness fees. PSD asks the court to decline jurisdiction or in the alternative require a bond of at least \$10,000. The court finds that security in this case helps insure that groundless actions are not brought or maintained, and helps insure that Plaintiff is able to pay any costs or fees that may be ordered paid by Plaintiff. This is clearly the intent of the statute as there would otherwise be no reason for the statute to refer to attorney fees among the costs the bond is conditioned to pay. The statute specifically refers to a bond with sureties. The court finds that the intent of the statute is satisfied by a bond in the form of a cash deposit or a surety bond. However, the court also concludes that the requirement of a bond was not intended to be punitive or to prevent contesters having reasonable access to the courts.

Therefore, the court declines to take jurisdiction over this matter at the present time. The court will, however, approve an \$8,000 cash or surety bond. The court will proceed to schedule a hearing but the court will not accept jurisdiction to proceed with the hearing and will dismiss the action unless the requested bond is posted no later than 12:00 p.m. the day prior to the day of the hearing. The court will consider the motion to dismiss filed by the “indispensable party” immediately upon filing of the requested bond so plaintiff should respond to the motion to dismiss prior to, or at the time of, filing the bond.

The parties shall contact the court to schedule a hearing and shall inform the division clerk as to the estimated time needed for the presentation of each party’s evidence. The court has extremely limited time available so the court will likely require offers of proof for direct

testimony depending on the time available for the hearing and the amount of evidence the parties desire to present.

SO ORDERED: August 23, 2016,

BY THE COURT:



Stephen E. Howard
District Court Judge

EXHIBIT B

District Court, Larimer County, State of Colorado 201 LaPorte Avenue, Suite 100 Fort Collins, CO 80521-2761 (970) 494-3500	DATE FILED: September 2, 2014 4:22 PM CASE NUMBER: 2014CV115	
Plaintiff: ERIC SUTHERLAND, v. Defendant: BOARD OF COUNTY COMMISSIONERS OF COUNTY OF LARIMER, a political subdivision of the State of Colorado	▲ COURT USE ONLY ▲	
	Case No.: 2014CV115 Courtroom: 5C	
<p style="text-align: center;">ORDER DECLINING JURISDICTION</p>		

Plaintiff Eric Sutherland filed this action which he titled "A Contest Arising Out of a Ballot Question Election Concerning the Form and Content of a Ballot Title", challenging a ballot title set by the Board of County Commissioners for Larimer County. Plaintiff alleges that C.R.S. 1-11-203.5 establishes the procedures for contesting the ballot title.

C.R.S. 1-11-203.5(1) details the procedures for resolution of election ballot issues concerning that form or content of any ballot title. This statutes provides, in

pertinent part, that any such contest “[S]hall be summarily adjudicated by the district court sitting for the political subdivision within which the contest arises prior to the election.”

This same section of this statute provides that “[B]efore the district court is required to take jurisdiction of the contest, the contestor shall file with the court a bond, with sureties, running to the contestee and conditioned to pay all costs, including attorney’s fees, in case of failure to maintain the contest.”

Plaintiff filed no such bond. As such, the Court declines to take jurisdiction of this matter. The Court finds that this is an appropriate exercise of the Court’s jurisdiction because a surety bond helps insure that actions without merit are not brought or maintained, and no such protection is afforded to the Defendant in this case. This failure to file a surety bond was not an oversight or a situation where Plaintiff did not know about the requirement of a bond. Plaintiff showed in his Petition and other pleadings filed a detailed familiarity with C.R.S. 1-11-203.5, and discussed the filing of a bond in other pleadings he filed. Moreover, Defendant filed a Motion to Require Surety Bond on August 26, 2014 and Plaintiff filed no bond as of this date.

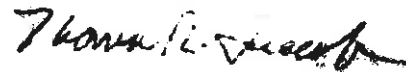
The Court, therefore, declines to take jurisdiction of this matter at this time. To provide guidance, however, the Court finds that a \$10,000 surety bond in favor of Defendant would be sufficient for the Court to take jurisdiction if Plaintiff elects to file a

surety bond. If no bond is filed before the hearing on September 4, 2014, the Court will not proceed with the hearing at that date and time.

The Court will not issue a ruling on Defendant's Motions to Dismiss until the conclusion of the hearing on September 4, 2014, if a bond is filed.

SO ORDERED: September 2, 2014,

BY THE COURT:

A handwritten signature in black ink, appearing to read "Thomas R. French", written over a horizontal line.

Thomas R. French
District Court Judge

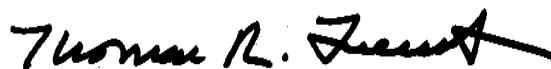
EXHIBIT C

District Court, Larimer County, State of Colorado 201 LaPorte Avenue, Suite 100 Fort Collins, CO 80521-2761 (970) 494-3500	DATE FILED: December 11, 2014 4:05 PM CASE NUMBER: 2014CV166	
Plaintiff: ERIC SUTHERLAND, v. Defendant: BOARD OF COUNTY COMMISSIONERS OF COUNTY OF LARIMER, a political subdivision of the State of Colorado	▲ COURT USE ONLY ▲	Case No.: 2014CV166 Courtroom: 5C
SECOND ORDER RE SECURITY		

The Court has now considered Plaintiff's position on the amount of the sum to be deposited with the Clerk of the Court to serve as security under C.R.S. §1-11-213(3). The Court orders that Plaintiff's written promise and filing of same to pay all costs and fees determined to be owed to Defendant from Plaintiff in this matter, which written promise shall be secured by \$10,000 cash or certified funds deposited with the Clerk of the Court no later than noon on December 12, 2014 and to be held until the conclusion of this matter, is sufficient security for the Court to accept jurisdiction of this matter under C.R.S. §1-11-213(3).

SO ORDERED: December 11, 2014,

BY THE COURT:



Thomas R. French
 District Court Judge