EIGHTH JUDICIAL DISTRICT COURT, STATE OF COLORADO Court Address: Larimer County Justice Center 201 Laporte Avenue Fort Collins, Colorado 80521 Telephone: 970-494-3500	
Contestor: Larry Sarner, *v.* **Contestee:** City of Loveland; **Indispensable Party:** Angela Myers, Clerk and Recorder of Larimer County; *Party without attorney:* Larry Sarner, *pro se* 711 West Ninth Street Loveland, Colorado 80521 Telephone: 970-667-7313 larry.sarner@gmail.com	▲ COURT USE ONLY ▲ Case Number: **16 CV 230** Courtroom: **5C**

MOTION TO DEEM BOND SUFFICIENT

Comes now the Contestor, Larry Sarner, *pro se*, to move this Court to deem the bond submitted by him pursuant to Colorado Revised Statutes ("CRS") §1-11-203.5. In support thereof, the Contestor states as follows:

1. On Thursday last, August 25, 2016, Contestor filed with this Court a petition contesting two ballot questions set by the Contestee, City of Loveland. Both ballot questions seek voter approval under provisions of the Taxpayer's Bill of Rights ("TABOR") (Colo. Const., Art. V, Sec. 20). Even as this petition was filed under the provisions of Colorado Revised Statutes ("CRS") §1-11-203.5,

this contest is necessarily in its nature an enforcement action of TABOR. Indeed, as the legislative history of 1-11-203.5 shows, the statute was enacted specifically as a means of citizen enforcement of provisions of TABOR (*Cacioppo v. Eagle County School District*, 92 P.3d 453)

2. A jurisdictional prerequisite for this contest is found in CRS §1-11-203.5(1), which states in relevant part:

> 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 attorneys fees, in case of failure to maintain the contest. The judge shall determine the sufficiency of the bond and, if sufficient, approve it.

3. Coincident with the filing of this Motion, the Contestor has filed with the clerk of the 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 (the "Bond"). The amount of the bond filed is $50. This amount should be deemed sufficient for the specific purpose of "failure to maintain the contest," as hereafter explained.

Bond Requirement for "Failure to Maintain Contest" is Moot

4. The language of the statute makes clear that the purpose of the bond is to assure recovery for contestees of the costs and fees to which they may be lawfully entitled in circumstances where contestors abandon cases which had been meant only to disrupt the election process. This language was copied by the General Assembly from existing statutes involving *post*-election contests involving candidates for elective office. Such contests—and abandonments—were common in candidate elections, and deserved redress in the form of a bond, but in *pre*-election contests, such as that here, the bond serves little actual security purpose.

5. CRS §1-11-203.5 provides for a statutorily defined judicial procedure that is paced by conditions in the statute. An immediate consequence of that pacing is that the very filing of the petition launches an expedited proceeding with very short time frames for answer, hearing, and decision. Since the matter is to be *summarily adjudicated*, the parties' pleadings must necessarily be all of their participation. For instance, once a contestor files the petition, the case can proceed on the content of that petition alone, as far as the Contestor is concerned. Though the contestor may choose to make or oppose motions, *maintenance* of the contest by the contestor is necessarily accomplished with

the initial act of petitioning, and is not dependent upon subsequent responses, motions or other actions.

6. Because Colorado courts, while exploring theories of law with respect to TABOR, sometimes conclude that the facts actually reveal a challenge to the "form and content" of a ballot issue. Waiting to advance such a theory with such facts in a post-election challenge has sometimes resulted in a claim being time-barred. (See *Busse v. City of Golden*, 73 P.3d 660, Colo. 2003, holding that claim that a ballot issue was invalid because it contained multiple purposes is a challenge to the form or content of the ballot title; consequently, claim was time-barred because it was not filed within five days after the title of the ballot issue was set.) Therefore a contestor, as here, has no other option than to bring forward some of the challenges made in his petition in a pre-election contest to settle questions of form and content. All challenges brought by the petition are made in good faith by the Contestor to explore theories of law reasonaby thought to be applicable.

7. The Contestor also makes an offer of proof that he presented his challenges before the City Council of the Contestee on at least two occasions while that body was considering the adoption of an ordinance setting the election. On neither occasion did Contestor receive any encouragement that his challenges might be considered valid or worthy of adoption. Upon adoption of the ordinance, Contestor was left with no other option than to pursue the present action.

8. Thus, the question of the Contestor's "failure to maintain the contest" has been moot from the start of the contest. Because of the expedited nature of the proceeding, the Contestor's petition must lay out the causes of action and the theories of law thought to be applicable. As a consequence, the whole of the case can be decided from the petition, and Contestee's response thereto. No question of *failure* to maintain can possibly appertain, and so the possibility of an award to Contestee is nil.

Sufficiency of Amount

9. The statute requires *some* bond, but the amount is left to the judge's discretion. But since the underlying condition for awarding the security can never be achieved, any amount above zero would necessarily be sufficient. The discretion of the court must run not to failure—which is not possible—but to sustaining the action on the part of the Contestor. The bond amount should work only to allow a Contestor to proceed with the contest.

10. Setting a bond amount high enough to chill contests is necessarily an abuse of discretion by the judge, and leads to a denial of due process. (U.S. Const., XIVth Amendment; also Colo. Const., Art. II, Sec. 25.) Such abuse could give rise to an interlocutory appeal to the next appellant level, *i.e.*, the Supreme Court in this case. Even with an expedited proceeding, any appeal necessarily results in significant delay to the summary adjudication needed to resolve the contest and to proceed with a lawful, orderly election (with some very tight timelines that might be missed).

Bond Amounts are Obviated or Mitigated by TABOR and Statute

11. The only requirement for the bond at issue is, as mentioned in ¶¶4-5, just for the purpose of securing an award for failure to maintain the contest. Contestee is unaware of the applicability of any other statute which could use this statutory requirement for the posting of a bond as a jurisdictional prerequisite to secure against a possible award of costs and fees. However, even if statutory authority for such a bond did exist, there are substantial limitations, elsewhere in statute, on the amount of the awards which would be secured thereby.

12. As stated before (¶1), the ballot issues being contested in this action are TABOR elections, and this contest is a TABOR enforcement action. TABOR itself declares that its provisions are self-executing, and anticipates citizen enforcement through the courts with:

> Individual or class action enforcement suits may be filed and shall have the highest civil priority of resolution. Successful plaintiffs are allowed costs and reasonable attorney fees, but a district is not unless a suit against it be ruled frivolous.

CRS §1-11-203.5(3) was adopted specifically to implement these provisions of TABOR in election contests such as the present one. The language of the subsection makes that plain:

> If the court finds that the order of the ballot or the form or content of the ballot title does not conform to the requirements of the state constitution and statutes, the court shall provide in its order the text of the corrected ballot title or the corrected order of the measures to be placed upon the ballot and shall award costs and reasonable attorneys fees to the contestor. If the court finds that the order of the ballot and the form and content of the ballot title conform to the requirements of the state constitution and statutes and further finds that the suit was frivolous as provided in article 17 of title 13, C.R.S., the court shall provide in its order an award of costs and reasonable attor-

neys fees to the contestee state or political subdivision and to the proponent of an initiated measure.

13. So, unless the Court finds against *all* of the challenges to the form or content of the ballot titles asserted in Contestor's petition, and still further that the petition was frivolous from the start, there can be no awards made to Contestee. If there can be no awards, there is nothing for a bond to secure. Thus, there can be no requirement for a bond beyond "failure to maintain." But, considering a bond against the *possibility* of an award, the judge must ascertain the sufficiency of any bond, which requires that the jurist judge the case of the Contestor with respect to frivolousness; doing so *before* accepting jurisdiction would be a denial of due process.

14. Contestor in this petition is before this Court *pro se*. CRS §13-17-102(6) therefore applies:

> (6) No party who is appearing without an attorney shall be assessed attorney fees unless the court finds that the party clearly knew or reasonably should have known that his action or defense, or any part thereof, was substantially frivolous, substantially groundless, or substantially vexatious;

Therefore, attorney fees are not awardable unless I clearly know that anything in my petition is frivolous, groundless or vexatious. I declare now that I know of nothing that fits that description in my petition. Therefore, attorney fees cannot be part of the ascertainment of sufficiency for any bond.

15. A review of the petition shows several challenges which, to my knowledge, have not been litigated before, or have not yet been subject to appellate review, i.e., matters of "first impression". On such matters, CRS §13-17-102(7) applies:

> (7) No attorney or party shall be assessed attorney fees as to any claim or defense which the court determines was asserted by said attorney or party in a good faith attempt to establish a new theory of law in Colorado.

16. From the foregoing, when ascertaining the sufficiency of any bond, the exclusion of attorney fees from any subsequent award is highly likely. That leaves only costs. Contestee's costs for an expedited, 15-day action (of which four days have already elapsed) most certainly will be *de minimus*, even if allowed under TABOR. Therefore, demanding a pre-jurisdiction bond of any sizable amount in such circumstances would be an abuse of discretion. In the present action, costs beyond $50 would be unlikely.

Requiring a High Bond Would Chill Citizen Enforcement of TABOR

17. In *Cerveny v. Wheatridge*, 913 P.2d 1110 at 1119 (1996), the Colorado Supreme Court declared:

> The attorney fees provision of Amendment 1 [TABOR] apparently was intended to enable citizens of ordinary means to enforce Amendment 1.

Contestor is a retired citizen of ordinary means. There is no manner of remuneration to be derived from bringing or maintaining the present contest. Meeting a requirement for a large bond would literally drain Contestor of all his liquid assets.

18. Requiring a large pre-jurisdictional bond would chill the Contestor, as it would any other citizen similarly situated, from ever using the courts to enforce TABOR. Even with a reasonable expectation of return of the bond at the end of the proceedings, win or lose, giving judges arbitrary use of security bonds, so that they may be discretionary gate-keepers of access to enforcement of a vital constitutional provision, is neither good public policy nor just.

19. A proposed Order of Sufficiency of Bond is attached to this Motion.

Now, therefore, the Contestor requests that the Court forthwith grant his motion to deem a $50 bond as sufficient in this circumstance, so that this contest may proceed expeditiously in the time frame intended by statute, minimizing disruption and uncertainty with the lawful conduct of the upcoming general election. Let us get to the issue at hand, instead of trying to keep this contest from having its day in court.

Respectfully submitted this 1st day of September, 2016.

Larry W. Sarner

Larry Sarner, Contestor

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ORDER OF SUFFICIENCY OF BOND

Upon review of Contestor's Motion to Deem Bond Sufficient of September 1, 2016, the Court FINDS and ORDERS as follows:

> The sum of $50.00, presently deposited with the Clerk of this Court by the Contestor, is hereby deemed sufficient for the purposes of a bond, with sureties, running to the Contestee and conditioned to pay all costs, including attorneys fees, in case of failure to maintain the present contest, as required by §1-11-203.5(1) C.R.S.

DONE, this ____ day of _____, 2016.

_____

District Court Judge

Certificate of Delivery

I hereby certify that I have, on September 1, 2016, delivered a true and correct copy of the foregoing, by the means indicated, to the following:

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