

<p>DISTRICT COURT, COUNTY OF LARIMER, STATE OF COLORADO</p> <p>Court Address: 201 LaPorte Avenue Fort Collins, CO 80521-2761 Phone Number: (970) 494-3500</p>	<p style="text-align: center;">▲ FOR COURT USE ONLY ▲</p>
<p>NETFLIX, INC.,</p> <p>Plaintiff</p> <p>v.</p> <p>DEPARTMENT OF REVENUE OF THE CITY OF LOVELAND, COLORADO; AND BRENT WORTHINGTON, FINANCE DIRECTOR for the CITY OF LOVELAND, COLORADO</p> <p>Defendants.</p>	
<p>Attorneys for Defendants Department of Revenue, City of Loveland, a Municipal Corporation; and Brent Worthington, Finance Director: Alicia R. Calderón, #32296 Assistant City Attorney II</p> <p>Loveland City Attorney's Office 500 E. Third Street, Suite 300 Loveland, CO 80537 (970) 962-2544 alicia.calderon@cityofloveland.org</p>	<p>Case Number: 2017CV30835</p> <p>Courtroom: 5C</p>
<p style="text-align: center;">UNOPPOSED MOTION TO DISMISS COMPLAINT AND APPEAL</p>	

COMES NOW the City of Loveland, a municipal home rule corporation, the Revenue Department of the City of Loveland, and Brent Worthington, Finance Director for the City of Loveland, by and through undersigned counsel, and submit this Motion to Dismiss and in support state as follows:

Certificate of Conferral Pursuant to C.R.C.P. 121 § 1-15:

Undersigned counsel conferred with Plaintiff's counsel, and Plaintiff does not oppose the motion.

I. PROCEDURAL BACKGROUND

The City of Loveland (the “City”) is a home rule municipality with all powers granted under the City Charter and the Colorado Constitution, including the power to assess and collect sales and use taxes. The City’s Revenue Division issued a Notice of Determination, Assessment and Demand for Payment to Netflix, Inc. (hereafter “Plaintiff”) on August 23, 2016. (Exhibit 1 to the Complaint). The Notice informed Plaintiff of a sales tax audit and assessment from “sales/rental of tangible personal property for which sales tax was not charged to customers or remitted to the City. (Complaint, paragraph 8). Plaintiff timely filed a request for a hearing and petition for review of the notice of determination. The City granted Plaintiff’s request for a hearing, held January 17, 2017. Plaintiff appeals the tax assessment under C.R.S. § 29-2-106.1(8). The City has rescinded the tax assessment and returned the deposit, making this issue moot. (See Exhibit 1 – Letter to Plaintiff)

II. APPEAL SHOULD BE DISMISSED AS THERE IS NO TAX ASSESSMENT SUBJECT TO APPEAL MAKING THE CASE MOOT

The City alleged the Streaming Service was subject to sales tax as to the lease or rental of tangible personal property. The City uses State sales tax definitions found at C.R.S. § 39-26-102 and the State Department of Revenue interpretations of those definitions. Loveland Municipal Code § 3.16.010. The City Revenue Division issued the Notice of Determination, Assessment and Demand for payment, and the Revenue Manager has now rescinded the assessment. The State Department of Revenue should be the entity clarifying the law around what is or is not tangible personal property subject to taxation, especially in an emerging arena of digital goods. The City has closed the assessment, returned the deposit, and will not be re-opening the three year audit period. Plaintiff no longer owes the City for this tax audit and assessment, and there is nothing for the Court to review. Furthermore, there is no relief to be granted. Plaintiff seeks an order canceling all sales and use taxes imposed, including interest and penalties and an order releasing payments made. This relief has already been achieved by the City rescinding the assessment.

The City moves for dismissal as this case is now moot. “A case is moot when the relief sought, if granted, would have no practical legal effect on the controversy.” *Gresh v. Balink*, 148 P.3d 419, 421 (Colo. App. 2006), citing *Crowe v. Wheeler*, 165 Colo. 289, 439 P.2d 50 (1968). Generally, courts will decline to render an opinion as to the merits of an appeal where an issue becomes moot due to subsequent events. *In re Balanson*, 25 P.3d 28, 38 (Colo. 2001). In this matter, a judgment would have no effect since the three year assessment period has been closed and the tax assessment rescinded. The City will wait until the State Department of Revenue has issued guidance through regulations or an interpretation on the issue of whether a streaming product is taxable.

There are two general exceptions to the mootness doctrine. Courts consider the merits when the matter involves a question of great public importance or the issue is capable of repetition, yet evades review. *Gresh* at 422. A tax assessment is unique to the individual business, and as the

complaint shows, involves many detailed facts and technology. This is not a matter of general public importance. As for the second exception, the City is deferring to the appropriate state entity for a legal interpretation of the definition of tangible personal property as it pertains to a streaming service or product. The City's tax assessment is now closed and the three year audit period will not be re-opened. Using the City of Loveland to obtain a court ruling binding upon the State of Colorado is not appropriate when the State of Colorado is not a party to these proceedings. These are matters of statewide concern, and the State Department of Revenue should resolve the issue of what is taxable. The City will be awaiting such guidance and will not be conducting any further audits until the State provides regulations or a Private Letter ruling regarding streaming services. As such, this case is not capable of repetition. The issues are moot.

Plaintiff's allegation that the City's tax audit and assessment creates a "discriminatory tax" supports the City's position that this issue should be resolved at the State level. Allowing the State Department of Revenue to promulgate regulations or issue a binding interpretation will resolve Plaintiff's allegation of potential multiple taxes or discriminatory tax assessments. Lastly, since the City has rescinded the audit and assessment, Plaintiff's arguments about nexus are also moot.

III. CONCLUSION

Plaintiff's claims should be dismissed. There is no longer a live controversy between the parties. A judgment ordering the relief which has already been granted would have no practical effect. The City canceled the assessment and returned the deposit sent for payment. There is no relief to be granted. The case is moot.

WHEREFORE, the City respectfully requests that the Court dismiss the Complaint with prejudice.

Dated this 26th day of October, 2017.

CITY OF LOVELAND

Original signature on file

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CERTIFICATE OF SERVICE

The undersigned certifies that the foregoing **UNOPPOSED MOTION TO DISMISS COMPLAINT AND APPEAL** was served via the method listed below on this 26th day of October, 2017 to the following:

Via ICCES e-Service:

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