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September 13, 2013

VIA FEDERAL EXPRESS

James I. Peale, Clerk
Cheshire County Superior Court
12 Court Street
Keene, NH 03431

Re: City of Keene v. James Cleaveland, et al.
Docket No.: 213-2013-CV-00098

Dear Clerk Peale:

Enclosed for filing is City of Keene's Objection to Motion to Dismiss regarding the above-captioned case.

Thank you for your attention to this matter.

Very truly yours,

Charles P. Bauer

CPB:lbl
Enclosure

cc: Jon Meyer, Esquire
Peter Eyre, *Pro Se*
Thomas Mullins, Esquire

STATE OF NEW HAMPSHIRE

CHESHIRE, SS. SUPERIOR COURT

CITY OF KEENE

v.

JAMES CLEAVELAND
GARRET EAN
KATE AGER
IAN BERNARD A/K/A IAN FREEMAN
GRAHAM COLSON
PETE EYRE

Docket No. 213-2013-CV-00098

CITY OF KEENE'S OBJECTION TO MOTION TO DISMISS ON BEHALF OF RESPONDENTS JAMES CLEAVELAND, GARRETT EAN, KATE AGER, IAN FREEMAN, AND GRAHAM COLSON

NOW COMES, the City of Keene ("Petitioner"), by its co-counsel, Gallagher, Callahan and Gartrell, P.C., and submits this Objection to the Motion to Dismiss on behalf of respondents James Cleaveland, Garrett Ean, Kate Ager, Ian Freeman, and Graham Colson, and says as follows:

1. In the first instance, Respondents' Motion to Dismiss is not ripe for ruling. The City has not completed the introduction of all evidence to establish the strong likelihood of success on the merits of its claim. A second day of evidentiary hearing is scheduled for September 30, 2013. A motion to dismiss filed mid-hearing is akin to seeking a directed verdict before the close of a plaintiff's case-in-chief. Respondents' Motion should be denied.

2. Notwithstanding this procedural anomaly, however, Respondents' Motion fails as a matter of law. Respondents rely on the argument that no New Hampshire precedent stands for the proposition that a municipality may press a claim of tortious interference with contractual

relations. A lack of precedent does not a bar make. Employers in New Hampshire have brought injunctions and tortious interference claims against interferring defendants for decades. A third-party defendant who interferes with the contractual employment relationship of an employee to his/her employer may be subject to an injunction and liability for such a tort. That the employer in this instance is a municipality makes no legal difference.

3. Plaintiffs point to no case law in this state or any other state that supports their motion to dismiss and their position that no cause of action exists.

4. It is well established that municipalities are corporate entities, with property rights and interests equivalent to any other corporation:

a. The City of Keene is a municipal corporation which "may sue and be sued, prosecute and defend, in any court or elsewhere." RSA 31:1.

b. Towns are granted the right to sue without limitation, *see Town of Madbury v. State*, 115 N.H. 196, 199 (1975) (J., Grimes dissenting), and municipalities are not barred from seeking injunctive relief. *See, e.g., Town of Nottingham v. Lee Homes, Inc.*, 118 N.H. 438, 440 (1978) (town petition for permanent injunction to enjoin defendants from occupying certain mobile homes).

c. Municipal employers are not immune from suit by their employees for hostile work environments. *See, e.g., Porter v. City of Manchester*, 151 N.H. 30, 42 (2004) (sustaining jury verdict that municipal employee's working conditions were so difficult and intolerable that a reasonable person would feel forced to resign).

Accordingly, the City of Keene, like any other corporate employer, has protected and vested property rights in its employees that may be protected and defended against outside influences

and attack. The City of Keene, also has an obligation to provide a safe non-hostile work environment. Through this suit, the City seeks to protect the PEOs from the hostile working environment they are forced to endure while performing their job duties for the City and prevent Respondents from interfering with the contractual relationship the City has with the PEOs.

5. Under New Hampshire law, a defendant is liable for intentional interference with contractual relations where: 1) the plaintiff had an economic relationship with a third party; 2) the defendant knew of the relationship; 3) the defendant intentionally and improperly interfered with the relationship; and 4) the plaintiff was damaged by the interference. *Demetracopoulos v. Wilson*, 138 N.H. 371, 374 (1994) (internal citations omitted); *see also Donovan v. Digital Equip. Corp.* 883 F. Supp. 775, 787 (D.N.H. 1994); *Emery v. Merrimack Valley Wood Products, Inc.*, 701 F.2d 985, 988 (1st Cir. 1983) (applying New Hampshire law); *Jay Edwards, Inc. v. Baker*, 130 N.H. 41, 46 (1987). The City has properly alleged, and can present evidence to prove, each of the elements of this tort.

6. By focusing on the "improper" element of the tort, Respondents impliedly admit that they meet the other elements – the City has an economic relationship with its PEOs; Respondents are aware of that relationship; and the City has been damaged by Respondents' interference. That Respondents' interference is "intentional" should be undisputed. Respondents admit that they engage in activity designed to prevent the PEOs from performing their job duties. Respondents' Motion focuses solely on whether their interference rises to the level of "improper." In this respect, Respondents over-simplify the "improper" element of the tort by asserting that the City has not alleged that Respondents are acting with improper motive and, relatedly, Respondents assert that the Court cannot inquire into Respondents' motive for interfering without improperly inquiring into Respondents' political idealogy.

7. "Improper motive" is not the only consideration when determining liability for intentional interference. Section 767 of the Restatement (Second) of Torts (1977) sets forth a number of factors to be considered in determining whether an intentional interference with a contractual relationship will be considered tortious:

> "In determining whether an actor's conduct in intentionally interfering with a contract or a prospective contractual relation of another is improper or not, consideration is given to the following factors: (a) the nature of the actor's conduct, (b) the actor's motive, (c) the interests of the other with which the actor's conduct interferes, (d) the interests sought to be advanced by the actor, (e) the social interests in protecting the freedom of action of the actor and the contractual interests of the other, (f) the proximity or remoteness of the actor's conduct to the interference and (g) the relations between the parties."

See also Roberts v. Gen. Motors Corp., 138 N.H. 532, 540-41 (1994).

8. The "actor's motive" is but one factor when determining improper interference. In this case, the City has alleged and can prove that: the nature of Respondents' conduct is improper; the interests of the PEOs outweigh those of the Respondents; Respondents' interests can be advanced by means other than the improper conduct in which they are engaged; the balancing of the protected freedoms weighs in favor of the City; and the Respondents' literal physical proximity and the nature of their actions toward the PEOs is improper.

9. Respondents' continuing focus on free speech distracts from the fact that Respondents are engaged in intentional interference with the City's employment relationships. Respondents have expressed that their specific intent is to cause the City's employees to quit their jobs. Respondents have already accomplished their mission by forcing one employee to resign due to their actions and conduct against him which caused stress and anxiety.

10. The City does not deny that Respondents have a right to express their opinions about parking enforcement in the City. Contrary to Respondents argument, the City is not seeking to suppress public criticism. Rather, the City seeks a reasonable time, place, and manner restriction that balances Respondents' rights to freely express their positions with the PEOs' rights to be free from interference while performing their job duties. It is Respondents' improper actions in expressing their ideas, rather than the ideas themselves, that the City seeks to reasonably restrict.

11. Finally, Respondents assert that the City's claim must fail because it did not allege that any PEO resigned his/her employment. This argument is not a proper basis for dismissing the City's claim. First, the City initiated this equity action (seeking only injunctive relief) specifically to prevent such damage from occurring. At the time of filing, the PEOs had suffered upwards of five months of daily interference and were repeatedly informing their supervisor of an intent to quit due to the harassment. That no PEO had yet resigned did not preclude an intentional interference claim. To suggest that an employer must first wait for the intentional interference to be effective before filing an action to prevent it is illogical. Second, as the continuing evidence and testimony will show, at least one PEO has since resigned and another has requested a significant modification of her hours due to the continuing harassment. Respondents' argument that a PEO resignation does not constitute damage because the decision to resign was within the control of the PEO is without merit and ignores the intentional interference that is at the heart of this lawsuit.

12. Respondents' Motion to Dismiss is untimely and not ripe for ruling. Respondents inappropriately focus on only a single factor of the intentional interference tort and seek to further muddy the legal water by improperly alleging that the City is seeking to suppress public

criticism. Respondents' Motion should be denied and the City should be allowed to present their remaining evidence and testimony to show that Respondents are intentionally interfering with the City's contractual relationship with the PEOs.

WHEREFORE, the City of Keene respectfully requests that this Court:

A. Deny Respondents' Motion to Dismiss; and

B. Grant such other and further relief as is just and equitable.

Respectfully submitted,

CITY OF KEENE

By Its Attorneys,

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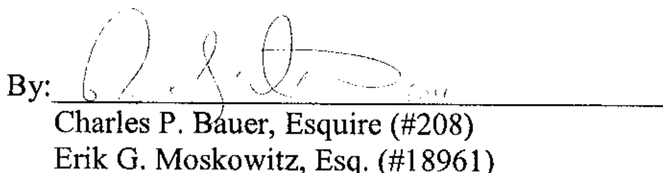
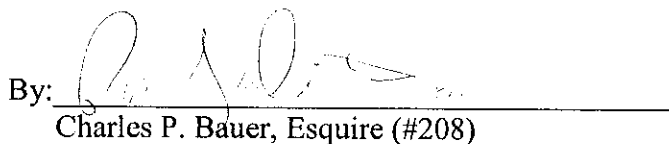


Dated: September 13, 2013 By:______________________
Charles P. Bauer, Esquire (#208)
Erik G. Moskowitz, Esq. (#18961)

CERTIFICATE OF SERVICE

I hereby certify that I have this date forwarded a copy of the foregoing to Peter Eyre, *Pro Se* , and Jon Meyer, Esquire, Counsel for Ian Bernard f/k/a Ian Freeman, Garret Ean, James Cleaveland, Kate Ager, and Graham Colson.



Dated: September 13, 2013 By:______________________
Charles P. Bauer, Esquire (#208)