

RESOLUTION NO. 2150

**A RESOLUTION OF THE CITY COUNCIL OF GOLDEN,
COLORADO APPROVING A JOINT DEFENSE AND
CONFIDENTIALITY AGREEMENT, REGARDING THE DEFENSE
OF A SALES TAX REFUND APPEAL**

WHEREAS, the City of Golden Finance Department has received a sales tax refund request from a taxpayer for sales taxes on sales of internet access services allegedly collected and remitted to the City; and

WHEREAS, several other cities in Colorado have received similar sales tax refund requests; and

WHEREAS, Golden, with these other Colorado cities, desires to present a joint defense to certain issues arising out of the sales tax refund request, while also protecting confidential and/or privileged information shared in preparation of a joint defense; and

WHEREAS, on April 14, 2011, the City Council approved Resolution No. 2120, which authorized a Joint Defense and Confidentiality Agreement between the City of Golden and the Cities of Thornton, Littleton, Lafayette, and Commerce City; and

WHEREAS, the Cities of Lakewood and Wheat Ridge wish to join in the Joint Defense and Confidentiality Agreement, along with their attorneys, Kissinger & Fellman, PC (representing Lakewood) and Murray, Dahl, Kuechenmeister & Renaud LLP (representing Wheat Ridge), due to similar issues of law and fact arising out the refund claims submitted to those cities; and

WHEREAS, in order to facilitate the cooperation of Golden and the other cities in preparing a joint defense, it is necessary that Golden and the other cities agree to protect the confidentiality of work-product or other confidential information that may be shared in preparation of the joint defense; and

WHEREAS, the City Council desires to enter into the attached Joint Defense and Confidentiality Agreement to participate in the preparation of the joint defense to the taxpayer claim.

THEREFORE, BE IT RESOLVED BY THE CITY COUNCIL OF THE CITY OF GOLDEN, COLORADO:

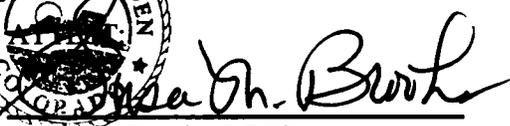
The Joint Defense and Confidentiality Agreement, in substantially the same form as attached hereto as Exhibit A, is approved. The Mayor is authorized to execute such agreement on behalf of the City.

Adopted this 22nd day of September, 2011.



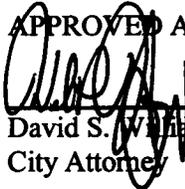
Karen L. Oxman
Mayor Pro Tem





Susan M. Brooks, MMC
City Clerk

APPROVED AS TO FORM:



David S. Williamson
City Attorney

I, Susan M. Brooks, City Clerk of the City of Golden, Colorado, do hereby certify that the foregoing is a true copy of a certain Resolution adopted by the City Council of the City of Golden, Colorado at a regular business meeting thereof held on the 22nd day of September, A.D., 2011.



ATTEST:



Susan M. Brooks, City Clerk of the City of
Golden, Colorado

Exhibit A

JOINT DEFENSE AND CONFIDENTIALITY AGREEMENT

THIS JOINT DEFENSE AND CONFIDENTIALITY AGREEMENT ("Agreement") is made and entered into by and between the City of Commerce City; the City of Fort Collins; the City of Lafayette; the City of Golden; Williamson & Hayashi, LLC, (representing the Cities of Lafayette and Golden); the City of Lakewood; Kissinger & Fellman, P.C. (representing the City of Lakewood); the City of Littleton; the City of Wheat Ridge, Murray, Dahl, Kuechenmeister & Renaud LLP (representing the City of Wheat Ridge), and the City of Thornton, hereafter, referred to collectively as "Parties" and individually as a "Party."

RECITALS

WHEREAS, each of the above-named municipalities has become involved in one or more Claims for Refund for sales taxes collected and remitted by either AT&T Mobility, LLC and/or New Cingular Wireless PCS LLC (collectively "AT&T"); and

WHEREAS, each of the above-named municipalities has become involved in such Claims for Refund submitted by legal counsel representing AT&T, and/or by legal counsel representing a taxpayer class of plaintiffs with respect to a federal district court proceeding, referred to as, *In re AT&T Mobility Wireless Data Services Sales Tax Litigation*, MLD No. 2147/No. 10c2278 (N.D. Ill.); and

WHEREAS, each of these Claims for Refund has invoked the administrative procedures under each of the municipalities' tax codes and have asked each of the municipalities either to concede the claim for refund or to schedule an administrative hearing to contest the Claim for Refund and thereby constitutes litigation; and

WHEREAS, the City of Thornton, the City of Lakewood, and the City of Littleton have also received notices of an appeal to the Colorado Department of Revenue which appeals a denial of a Claim for Refund based upon the assertion that the taxpayer class has exhausted local administrative remedies pursuant to C.R.S. 29-2-106.1; and

WHEREAS, in some instances, the named municipalities have received notices in which AT&T claims a refund for itself or has requested the municipalities to consolidate AT&T's refund request with the refund request on behalf of the taxpayer class and possibly, as participant in the appeal to the Department of Revenue for the Cities of Thornton, Lakewood and Littleton; and

WHEREAS, other Colorado municipalities, the Colorado Municipal League, and the Colorado Department of Revenue, all may or have interests in the outcome of such Claims for Refunds because the individual outcomes may or will impact the uniformity and predictability of sales tax revenues and collections for Colorado municipalities and the State of Colorado; and

WHEREAS, the purpose of this Agreement is to allow for a coordinated effort to establish and present a coordinated defense involving a shared perspective of the municipalities with respect to both interpretation of the Parties' tax ordinances and consequential interpretation of those ordinances which bring each municipality within the exemption provision, commonly referred to as the "grandfathering provision," of the Internet Tax Freedom Act ("ACT"), thereby excluding the municipalities from the moratorium provisions of the ACT prohibiting the collection of tax on sales of internet access; and

WHEREAS, this Agreement also intends to allow for cooperation between the Parties, and any other municipalities, in efforts to develop responsive pleadings, to the extent of shared issues and interest are present, regarding appeals filed with the Department of Revenue by common petitioners; and

WHEREAS, the Parties have entered into this Agreement to confirm their common interest in a common defense and shared perspective with respect to the above referenced Claims for Refund; and

WHEREAS, the Parties wish, by this Agreement, to maintain confidentiality as to any shared documents, work, attorney work-product, confidential and privileged attorney-client communications, witness interviews, evidence investigations, and other information including but not limited to information incorporated into the drafting, editing and research associated with and embodied in documents for submission to any administrative tribunal or court for the above-referenced Claims for Refund;

NOW, THEREFORE, for and in consideration of the foregoing recitals which the Parties incorporate herein, the Parties further agree as follows:

- 1. The Parties have mutual and common interests, although represented separately, to cooperate with each other to the extent permitted by law, and to share work product with regard to preparation of documents for submission to administrative tribunals or courts. Because of those mutual interests, the Parties desire that any work-product generated in response to the Claims for Refunds should remain protected from disclosure. Thus, the Parties want to insure that all communications made between and among the Parties in connection with work-product associated any joint efforts between and among the Parties, as specified herein, are and shall**

remain confidential and privileged communications

2. To further their common interests, the Parties intend to exchange privileged and work-product information including, but not limited to factual analyses, mental impressions, legal memoranda, outlines, notes, correspondence, witness interviews, evidence investigations, draft briefs, and other draft pleadings, hereinafter referred to as "Joint Defense Information." The Parties intend to exchange Joint Defense Information orally, electronically, and in documents. The Parties would not ordinarily disclose such Joint Defense Information but for their mutual and common interests in the defense of Claims for Refunds and pursuant to this Agreement. The Parties agree to maintain the confidentiality of all Joint Defense Information. Joint Defense Information is intended to be protected from disclosure to any adverse party or other outside third parties to the maximum extent permitted by applicable law.
3. The Parties agree that the Joint Defense Information shared between and among the Parties regarding the Claims for Refunds and the Appeals referenced herein is for the benefit of each of the Parties and/or their clients and in order to maintain the confidentiality of these documents, this Agreement is intended to allow the information exchanges and work-product developed along with all cooperative efforts of the Parties to be protected from disclosure to any adverse party or any other third party. The Joint Defense Information that the Parties intend to exchange is privileged from disclosure to adverse or other third parties as a result of the attorney-client privilege, the joint defense privilege, the attorney work product doctrine, the common interest doctrine, and other applicable privileges, protections, and doctrines (collectively the "Privileges"). By this Agreement, the Parties state that, in the pursuit of their common interests in defense of the Claims for Refund, they do not intend to waive the Privileges and that they intend to preserve the Privileges to the maximum extent permitted by applicable law.
4. A. The Parties recognize each Party's right to defend or to prosecute any proceedings regarding the Claims for Refund independently, including, without limitation, conducting separate witness interviews, independent investigative efforts, and independent discovery. The Party undertaking such separate investigative efforts is free (a) to disclose any information obtained pursuant to those independent efforts to any third party or to use the information in any manner that the Party desires, without the consent of any other Party to this Agreement; (b) to retain or work with investigators, consultants or experts; (c) to enter into individual settlements; and (d) otherwise to engage in any activity for its own benefit. Nothing in this Agreement shall obligate any Party to participate in any joint investigation, preparation, or defense relating to the Claims for Refunds, or to disclose any information or take any particular action with respect to the Claims for Refunds.

Moreover, nothing in this Agreement shall be construed to affect the separate and independent representation by each Party's attorney of that attorney's client or clients according to what that attorney believes to be in the best interest of his or her client or clients.

B. Each Party understands and acknowledges that it is represented only by its own attorneys in this matter. While attorneys representing other Parties have a duty to preserve the confidentiality of Joint Defense Information disclosed to them pursuant to this Agreement, those attorneys will not be acting for anyone other than those attorneys' respective client or clients and will not be undertaking any duty of care, duty of loyalty, or fiduciary duty to anyone other than those attorneys' respective client or clients. Each Party further understands and acknowledges that the attorneys representing other Parties have the right, and may well have the obligation, to take actions against the interests of Parties other than such attorneys' respective client or clients, including but not limited to, generating and disclosing evidence or information to third parties (apart from Joint Defense Information obtained from another Party pursuant to this Agreement), and cross-examining witnesses called in any proceedings regarding the Claims for Refund who are employees of other Parties.

5. Any Party is free to withdraw prospectively from this Agreement upon giving express written notification to each of the other Parties or their legal counsel, in which case this Agreement shall no longer be operative as to future communications between the withdrawing Party and the remaining Parties, but shall continue to protect all Joint Defense Information covered by this Agreement and disclosed to or by the withdrawing Party prior to the receipt of the withdrawing Party's notification of withdrawal. Such withdrawal by a Party does not terminate this Agreement, except as provided in Paragraph 11. In the event a Party settles all Claims for Refund between the Party and both AT&T and the relevant taxpayer class, that Party and its legal counsel shall be deemed to have withdrawn from this Agreement as of the date of its settlement agreement. If legal counsel for a Party ceases to be counsel for that Party, such counsel will be deemed to have withdrawn from this Agreement as of the date he or she ceases to be such legal counsel.
6. The Parties agree that a breach of the provisions of this Agreement will cause irreparable harm and, therefore, agree that injunctive relief is an appropriate means to enforce this Agreement. This Joint Defense Agreement is governed by Colorado law.
7. Modifications to this Agreement may be made only if such modifications are in writing and signed by or on behalf of all parties who have executed this Agreement. Legal counsel for a Party may sign such modifications on behalf of its client or

clients.

8. In the event that any term or provision of this Agreement should be found void, voidable or unenforceable, the remaining terms and provisions shall remain in full force and effect.
9. The purposes of this Agreement, between and among all Parties, may be considered satisfied upon the final termination of every Claim for Refund by AT&T and the taxpayer class involving any Party to this Agreement.
10. Any other municipalities or other organizations which share the common interests identified in the Recitals above may become a Party to this Agreement upon the unanimous consent of the existing Parties to this Agreement. Any approved new Party may join this Agreement by executing a copy of this Agreement in a manner consistent with the manner in which the existing Parties have demonstrated their assent to become bound by the terms and provisions of this Agreement.
11. This Agreement incorporates all prior oral and written agreements of the Parties, including the Joint Defense and Confidentiality Agreement previously entered into by the Cities of Thornton, Littleton, Commerce City, Lafayette, and Golden, and the law firm of Williamson & Hayashi, LLC, and this Agreement is effective as of the date of the Claims for Refund. This Agreement may be terminated at any time by agreement of the Parties, or by the withdrawal of all or any individual Party, but the confidentiality and nondisclosure provisions of this Agreement and the prior Joint Defense and Confidentiality Agreement shall survive termination.
12. This Agreement is executed by a proper representative of the Party and/or by counsel representing the named municipalities. This Agreement may be executed in counterparts and by facsimile, and each counsel represents that execution is duly authorized by the counsel's client and is to be effective for such municipality as of the date of execution.

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Resolution No. 2150
Page 8

FOR THE CITY OF THORNTON:

Gary G. Jacobson, Deputy City Attorney
9500 Civic Center Drive
Thornton, Colorado 80229

By: Gary G. Jacobson DATE

FOR THE CITY OF LITTLETON:

BY:

By: Doug Clark, Mayor of the City of Littleton

DATE: _____

APPROVED AS TO FORM:

By: Kirsten J. Crawford
Assistant City Attorney for the City of Littleton

DATE: _____

FOR THE CITY OF GOLDEN:

BY:

By: Jacob Smith, Mayor of the City of Golden

DATE: _____

APPROVED AS TO FORM:

By: Mary Lynn Benham
Assistant City Attorney for the City of Golden

DATE: _____

FOR THE CITY OF LAFAYETTE:

By: Frank Phillips, Mayor of the City of Lafayette

DATE: _____

APPROVED AS TO FORM:

By: Mary Lynn Benham
Assistant City Attorney for the City of Golden

DATE: _____

FOR WILLIAMSON & HAYASHI, LLC:

David S. Williamson, Esq.
Mary Lynn Benham, Esq.
Williamson & Hayashi, LLC
1650 38th Street
Boulder, CO 80301
(303) 443-3100

By: Mary Lynn Benham

Date: _____

FOR THE CITY OF COMMERCE CITY:

Gregory D. Graham, Assistant City Attorney
7887 East 60th Avenue
Commerce City, Colorado 80022
303-289-3406

By: Gregory D. Graham, Assistant City Attorney

Date: _____

FOR THE CITY OF LAKEWOOD:

Timothy P. Cox, City Attorney
480 Allison Parkway
Lakewood, Colorado 80226

Timothy P. Cox, City Attorney

Date: _____

FOR KISSINGER & FELLMAN, P.C.

Kenneth S. Fellman, Esq.
Paul D. Godec, Esq.
Kissinger & Fellman, P.C.
3773 Cherry Creek North Drive, Suite 900
Denver, Colorado 80209

Kenneth S. Fellman
Paul D. Godec

Date: _____

FOR THE CITY OF WHEAT RIDGE:

By: Jerry DiTullio
Mayor of the City of Wheat Ridge

DATE: _____

APPROVED AS TO FORM:

By: B. Brittany Scantland
City Attorney for the City of Wheat Ridge

DATE: _____

FOR MURRAY, DAHL, KUECHENMEISTER & RENAUD LLP:

B. Brittany Scantland, Esq.
Murray, Dahl, Kuechenmeister & Renaud LLP
The Historic Sugar Building
1530 16th Street, Suite 200
Denver, Colorado 80202

B. Brittany Scantland

Date: _____