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IN THE THIRD DISTRICT COURT OF THE STATE OF UTAH

MARK CHRISTOPHER TRACY, dba
EMIGRATION CANYON HOME OWNERS
ASSOCIATION,

Petitioner,

vs.

SIMPLIFI COMPANY, a Utah Corporation;
ERIC HAWKES, an individual; and
JENNIFER HAWKES, an individual,

Respondents.

**OPPOSITION TO MOTION TO DISMISS
PETITION FOR JUDICIAL REVIEW**

AND

**OPPOSITION TO MOTION FOR
AWARD OF ATTORNEY FEES TO A
NON-PARTY**

**REF: LEAD CONTAMINATION
LABORATORY TEST RESULTS OF A
PUBLIC DRINKING WATER SYSTEM**

Case No.: 200905123

Judge: Robert P. Faust

Petitioner Mark Christopher Tracy (“Mr. Tracy”) dba Emigration Canyon Home Owners Association (“The ECHO-Association”) hereby submits this Opposition to the Motion to Dismiss Petition for Judicial Review filed by the Simplifi Company (“Simplifi”), Eric Hawkes (“Mr. Hawkes”) and Jennifer Hawkes (“Mrs. Hawkes”) (collectively “Simplifi Respondents”) and likewise submits Opposition to Simplifi Respondents’ Motion for Award of Attorney Fees to the

non-party Emigration Improvement District (“EID” aka Emigration Canyon Improvement District, aka ECID).

I. SUMMARY OF SIMPLIFI RESPONDENTS’ ARGUMENTS

Simplifi Respondents contend that they are not subject to provisions of the Government Records and Management Act (“GRAMA”) due to the fact that Simplifi is a private company and although Mr. and Mrs. Hawkes are the sole directors/officers of Simplifi and have lone physical custody of all public records of EID, as private individuals Mr. and Mrs. Hawkes are not subject to GRAMA provisions, to include to this Court’s jurisdiction to award injunctive relief for willful violations of a lawful request for government records regarding the lead contamination of a public drinking water system.¹

Moreover, because the appeal to the Chief Administrative Officer was limited “only” to the “denial of an expediated response” and not the *de facto* denial of the request for government records, The ECHO-Association “lacks standing” due to fact that it failed to fulfill the requirements for judicial review (emphasis in original).²

Lastly, because “*EID*³ does not consider Petitioner’s GRAMA requests [for lead contamination test results of a public drinking water system] to be for the benefit of the public”⁴ Simplifi Respondents request this Court “award *EID* [*i.e.*, and not Simplifi Respondents]”⁵ attorney fees and costs of the present litigation (emphasis added).

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¹ Simplifi Respondents’ Motion at page 6 *et seq.*

² *Id.* at page 8 *et. seq.*

³ As presented to this Court, it is unclear if Utah Attorneys Jeremy R. Cook and Tim Nielson of the Salt Lake City law firm Cohn Kinghorn P.C. are representing Simplifi Respondents or EID in the present litigation.

⁴ Simplifi Respondents’ Motion at footnote no. 2.

⁵ *Id.* at page 13.

II. ARGUMENT

Simplifi Respondents are necessary parties to the present action under the Utah Rules of Civil Procedure (“URCP”), the appeal to the Chief Administrative Officer dated July 9, 2020 was not limited “only” to the denial of an “expedited response” but the rather the *de facto* denied request for public records in violation of Utah Code Ann. § 63G-2-204 (4) and (9), and the statutory provision for awarding attorney fees and costs under Utah Code Ann. § 78B-5-825(1) does not provide for an award of attorney fees and costs to a party, which did not prevail and was not a party to the litigation.

A. Simplifi Respondents are Necessary Parties and Subject To GRAMA Provisions

The Petition for Judicial Review of the denied request for government records filed by The ECHO-Association (“Petition”) documents, and Simplifi Respondents do not contest, that EID has no physical presence, maintains no employees, operates only through “independent contractors”, failed to convene a single trustee meeting and failed to respond to any request for public records prior to filing the Petition on July 31, 2020 as related to the lead contamination of water system No. 18143 currently operated by Simplifi Respondents.

Under Rule 19 (1) URCP a party necessary to the proceedings “shall be joined ... if in his [or her] absence complete relief cannot be accorded among those already parties.”

Utah Administrative Code R309-105-17(2)(a)-(b) provides that “[a]ll public water systems shall retain on their premises or at convenient location near their premises” the “original records of all sampling data and analysis” of lead contamination for a period not less than 12 years.

In the present case, EID is neither a named nor necessary party to the present litigation under Rule 19 URCP due to the fact that the governmental authority of EID is limited to “providing water and sewage service to residents of Emigration Canyon” and the public officials of EID have

no legal capacity or authority to order a private independent company or person(s) to either release or grant access to public documents located inside the private residence of Simplifi Respondents, *even if* that office is “funded to carry out the people’s business” under Utah Code Ann. § 63G-2-201 (11)(a) as alleged.⁶

As such, EID is neither a named nor necessary party under Rule 19 (a)(1) or (2) URCP and only Simplifi Respondents may be ordered by this Court to grant Mr. Tracy complete relief as petitioned herein.

B. The GRAMA Appeal to the Chief Administrative Officer Was Not Limited

Simplifi Respondents further argue that The ECHO-Association failed to appeal the *de facto* denial of the GRAMA request under Utah Code Ann. 63G-2-402 but rather “only” appealed the “request for expedited response” and as such failed to exhaust all administrative remedies prior to filing the instant litigation (emphasis in original).⁷

This argument also fails.

Utah Code Ann. 63G-2-204 stipulates:

- (4) After receiving a request for a record, a governmental entity shall:
 - (b) as soon as reasonably possible, but no later than 10 business days after receiving a written request, or five business days after receiving a written request if the requester demonstrates that expedited response to the record request benefits the public rather than the person:⁸
 - (i) approve the request and provide a copy of the record;

⁶ As Utah Attorney Cook and Cohne Kinghorn P.C. are also counsel of record for EID in pending federal and state litigation, it appears that the legal fees and costs of the Simplifi Respondents in the present action are paid with public funds by Emigration Canyon residents and taxpayers through EID property taxes and fees. If true, Simplifi Respondents are subject to the same GRAMA provisions as EID under Utah Code § 63G-2-103(11)(b).

⁷ Simplifi Motion at page 8.

⁸ Utah Code Ann. 63G-2-204 (5) provides that “[a]ny person who requests a record to obtain information for a story or report for publication or broadcast to the general public is presumed to be acting to benefit the public rather than a person.” *See* Petition at Ex. BB.

- (ii) deny the request in accordance with the procedures and requirements of Section 63G-2-205;
- (iii) notify the requester that it does not maintain the record requested and provide, if known, the name and address of the governmental entity that does maintain the record; or
- (iv) notify the requester that because of one of the extraordinary circumstances listed in Subsection (6), it cannot immediately approve or deny the request, and include with the notice:
 - (A) a description of the circumstances that constitute the extraordinary circumstances; and
 - (B) the date when the records will be available, consistent with the requirements of Subsection (7).

As Mr. Hawkes failed to provide description of the circumstances constituting “extraordinary circumstances” and specify a date when the records will be available under subsection 5, the “response” provided by Mr. Hawkes⁹ (although timely) was not a lawful response under GRAMA requirements, and as such, the “[*de facto*] denial of an expediated response” was immediately appealed by The ECHO-Association to the Chief Administrative Officer on the very same day.¹⁰

Moreover, GRAMA provisions only recognize two types of appeal to the Chief Administrative Officer. Under Utah Code Ann. § 63G-2-401(1)(a) a requestor “may appeal an access denial” by filing a notice of appeal with the chief administrative officer within 30 days after the records request is considered denied under § 63G-2-204(9).

In the event that the entity claims “extraordinary circumstances” and “specifies the date when the records will be available, under Utah Code Ann. 63G-2-204(4) the requestor “may appeal” that determination under the provisions of § 63G-2-401(1)(b).

The subject line and content of The ECHO-Association appeal dated July 9, 2020 can in no way be misconstrued as being limited to “only” to the denied request for an expediate response, but rather addressed the *de facto* denied request for all laboratory test results as recorded in the

⁹ See Petition at Ex. CC and Ex. EE.

¹⁰ Appeal to the Chief Administrative Officer on July 7, 2020 is allowed under the provisions of Utah Code Ann. § 63G-2-204(9) whereby “[i]f the governmental entity fails to provide the requested records or issue a denial within the specified time period [i.e., five business days], that failure is considered the equivalent of a determination denying access to the record.”

section of the appeal to the Chief Administrative Officer entitled “Relief Sought / Grounds for Appeal.”^{11, 12}

As Mr. Tracy could not know at that time if EID trustees would convene a special trustee meeting to address the request for lead-contamination test results and who would make the final decision of the appeal to the Chief Records Administrator under the circumstances, it is clear that the appeal addressed the denied access to the requested documents as Mr. Hawkes failed to properly respond to a lawful GRAMA request with the cursory remark “will get back to you as soon as possible.”¹³

As such, The ECHO-Association appealed both the “timely” (but invalid) response by Mr. Hawkes within five business days and as such the *de facto* denied request for government records due to the fact that Mr. Hawkes failed to notify The ECHO-Association of any “extraordinary circumstance” allowed under Utah Code Ann. § 63G-2-204(6) and Mr. Hawkes failed to provide a date when the records would be available under subsection 4(iv).

C. Motion for Award of Reasonable Attorney Fees to EID

Lastly, Simplifi Respondents motion this Court to find that the “Petition was meritless and not asserted in good faith and award *EID* its reasonable attorney fees in accordance with Utah Code Ann. § 78B-5-825(1)” (emphasis added).¹⁴

Under the requirements of Utah Code Ann. § 78B-5-825(1) the Court may only award reasonable attorney fees “*to a prevailing party* if the court determines that an action or defense to an action was without merit and not brought or asserted in good faith” (emphasis added).

¹¹ See Petition at Ex. BB.

¹² GRAMA only allows appeal of “access denial” and claimed “extraordinary circumstances” and not for “the denial of an expediated response.” The agreement of the Simplifi Respondents that The ECHO-Association only intended to appeal the request for an expediated response is therefore nonsensical.

¹³ *Id.* at Ex. CC.

¹⁴ Simplifi Respondents’ Motion at page 13.

As Simplifi Respondents are necessary parties to the current action, while EID is neither a named nor necessary party under Rule 19 URCP, the motion for attorney fees and costs should be denied as both premature and unauthorized by statute.¹⁵

III. CONCLUSION

For the foregoing reasons, The ECHO-Association requests that the Court deny Simplifi Respondents' motion to dismiss the Petition for Judicial Review and deny the Simplifi Respondents' motion to award attorney fees to a non-party to the present litigation.

DATED: 27th day of August, 2020.

MARK CHRISTOPHER TRACY dba
EMIGRATION CANYON HOME OWNERS
ASSOCIATION

/s/ Mark Christopher Tracy
Mark Christopher Tracy
Pro se Petitioner

¹⁵ It may be argued that a premature motion for attorney fees to be award to a non-party prior to any ruling by the Court is intended to harass and intimidate Mr. Tracy from pursuing this and other litigation against Simplifi Respondents and will be asserted at the proper stage of the proceedings.

CERTIFICATE OF SERVICE

I hereby certify that on the 27th day of August, 2020, a true and correct copy of the foregoing **OPPOSITION TO RESPONDENTS' MOTIONS TO DISMISS PETITION FOR JUDICIAL REVIEW and OPPOSITION TO AWARD OF ATTORNEY FEES TO A NON-PARTY** was sent via electronic mail to the following counsel of record:

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