HONORABLE JOHN R. RUHL
Noted for Hearing: December 6, 2017
Without oral argument

IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON

IN AND FOR THE COUNTY OF KING

S. MICHAEL KUNATH, Plaintiff, v. CITY OF SEATTLE, Defendant, and ECONOMIC OPPORTUNITY INSTITUTE, Intervenor-Defendant.	CONSOLIDATED No. 17-2-18848-4 SEA CITY OF SEATTLE'S OPPOSITION TO KUNATH'S MOTION FOR SANCTIONS
SUZIE BURKE, *et al.*, Plaintiffs, v. CITY OF SEATTLE, *et al.*, Defendant.	
DENA LEVINE, *et al.*, Plaintiffs, v. CITY OF SEATTLE, Defendant.	
SCOTT SHOCK, *et al.*, Plaintiffs, v. CITY OF SEATTLE, Defendant.	

PACIFICA LAW GROUP LLP
1191 SECOND AVENUE
SUITE 2000
SEATTLE, WASHINGTON 98101-3404
TELEPHONE: (206) 245-1700
FACSIMILE: (206) 245-1750

I. INTRODUCTION

There is nothing improper in briefing the merits of legal claims on summary judgment, even if the arguments asserted require the adoption of new law or the reversal or modification of eighty-year-old cases. Indeed, the plain language of Civil Rule 11 ("CR 11") expressly permits attorneys and parties to do so as long as it is in good faith. What CR 11 does not permit are abuses of the judicial process, particularly abuses meant to harass other parties, cause undue delay in proceedings, or create increased costs through baseless and frivolous filings.

Here, Defendant City of Seattle ("City") in good faith asserted first, that the statutory prohibition on a local "net income tax" does not apply to a tax on "total income," and second, that the City's income tax ordinance ("Ordinance") imposed an excise tax rather than a property tax, based on U.S. Supreme Court case law and analogous Washington Supreme Court case law on business gross income taxes. The first issue presents a question of first impression because no Washington court has ever interpreted the term "net income tax" under the relevant statute. The second requires reversal or modification of Washington Supreme Court precedent, which the City openly acknowledged and then set forth reasons why such a step was appropriate in this case. Both arguments were made in direct response to the merits of Plaintiffs' claims challenging the Ordinance and in the context of dispositive motion briefing.

Plaintiff Kunath fails to meet his high burden for justifying CR 11 sanctions in this case. Not only has the City acted squarely within what CR 11 permits, but the City has in no way abused the judicial process by presenting its good faith legal arguments. That the Court ultimately disagreed with the City does not mean the City's arguments were sanctionable. Further, Kunath's request is based on irrelevant speculation and appears to be motivated by a desire to intimidate the City into abandoning its appeal.

PACIFICA LAW GROUP LLP
1191 SECOND AVENUE
SUITE 2000
SEATTLE, WASHINGTON 98101-3404
TELEPHONE: (206) 245-1700
FACSIMILE: (206) 245-1750

This Court should deny the Motion for Sanctions.

II. STATEMENT OF FACTS

The facts regarding the City's passage and legal defense of the Ordinance are thoroughly briefed in the City's summary judgment filings. The City will not repeat them in full here. In short, after an open, public process, the City Council unanimously passed and the Mayor signed the Ordinance. In doing so, the City sought to raise necessary revenue for public purposes in a manner that the City believed was legally permissible. Plaintiffs brought four separate lawsuits asserting numerous legal challenges to the Ordinance. The City defended the Ordinance against these claims in dispositive motion briefing, putting forth case law and good faith legal arguments on the merits of Plaintiffs' claims.

III. STATEMENT OF ISSUES

1. The City defended its Ordinance on the merits based on case law and good faith legal arguments. Does asserting such arguments constitute frivolous conduct that meets the high threshold required to impose CR 11 sanctions?

IV. EVIDENCE RELIED UPON

The City relies upon the papers and pleadings on file with the Court in this matter.

V. ARGUMENT

A. Kunath does not meet the high threshold required for imposition of CR 11 sanctions.

CR 11 does not apply to the City's summary judgment arguments in this case. The purpose of CR 11 is to "deter *baseless* filings and to curb abuses of the judicial system." *Bryant v. Joseph Tree, Inc.*, 119 Wn.2d 210, 219, 829 P.2d 1099 (1992) (emphasis in original). The Rule is "designed to reduce 'delaying tactics, procedural harassment, and mounting legal costs.'" *Id.* (quoting and citing 3A L. Orland, Wash. Prac., *Rules Practice* § 5141 (3d ed. Supp. 1991)).

PACIFICA LAW GROUP LLP
1191 SECOND AVENUE
SUITE 2000
SEATTLE, WASHINGTON 98101-3404
TELEPHONE: (206) 245-1700
FACSIMILE: (206) 245-1750

To further these objectives, CR 11 requires, in relevant part, that

> to the best of the party's or attorney's knowledge, information, and belief, formed after an inquiry reasonable under the circumstances: (1) [a filing] is well grounded in fact; (2) it is warranted by existing law or a good faith argument for the extension, modification, or reversal of existing law or the establishment of new law; [and] (3) it is not interposed for any improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation . . . .

CR 11(a). The Rule "is not intended to chill an attorney's enthusiasm or creativity in pursuing factual or legal theories." *Bryant*, 119 Wn.2d at 219. Accordingly, "the threshold for imposition of these sanctions is high." *Skimming v. Boxer*, 119 Wn. App. 748, 755, 82 P.3d 707 (2004). And the burden is on the moving party to justify the request for sanctions. *Id.* at 754-55.

Kunath's assertion that the City's summary judgment arguments equate to improper and frivolous conduct subject to sanctions is without merit. First, the City's arguments cannot be frivolous because they directly address the merits of the legal claims asserted in the four lawsuits. There is no question that (1) whether the net income tax statute applied, and (2) determination of the nature of the City's income tax as a property tax, excise tax, or sui generis, went to the heart of the legal issues. Thus, addressing these issues in an agreed-upon dispositive motion briefing schedule is neither improper nor baseless. Kunath re-hashes the legal arguments on the merits to suggest that the City's arguments were frivolous because they ultimately were not successful in this Court. But that is not the proper CR 11 standard. Indeed, accepting Kunath's position would mean that CR 11 sanctions would be appropriate in any case where summary judgment is granted, because in all such cases the court determines that a party's claims fail as a matter of law. The Washington Supreme Court has rejected this contention. *Bryant*, 119 Wn.2d at 220 ("The fact that a complaint does not prevail on its merits is by no means dispositive of the question of CR 11 sanctions.").

Second, the City's arguments on these two issues were, as permitted by the Rule,

PACIFICA LAW GROUP LLP
1191 SECOND AVENUE
SUITE 2000
SEATTLE, WASHINGTON 98101-3404
TELEPHONE: (206) 245-1700
FACSIMILE: (206) 245-1750

"warranted by existing law or a good faith argument for the extension, modification, or reversal of existing law or the establishment of new law." CR 11(a)(2). As to the prohibition on local net income taxes in RCW 36.65.030, no case has ever interpreted this statute. Thus, the question of what "net income tax" means in RCW 36.65.030 was one of first impression. All parties resorted to secondary sources in support of their arguments. The City's arguments for how the net income statute should be interpreted were therefore not baseless. *See Hicks v. Edwards*, 75 Wn. App. 156, 163, 876 P.2d 953 (1994) (refusing to find an argument baseless where there was "no clear Washington authority" on issue). Regardless, the City's argument was premised on the good faith legal argument that "total income" as determined by the IRS is not the same as "net income" for multiple reasons articulated in the summary judgment briefing. It was not frivolous to assert in a case of first impression that the terms "total income" and "net income" mean different things.

As to the City's argument that the Ordinance imposes an excise tax, the City's position was well-grounded in existing law and good faith arguments for modification or reversal of prior cases, as necessary. The City repeatedly cited and quoted U.S. Supreme Court case law that supports the argument that an income tax is an excise tax rather than a property tax: "The question as to the nature of [an income] tax has come up repeatedly under state constitutions requiring taxes upon property to be equal and uniform, or imposing similar restrictions. Many, perhaps most, courts hold that a net income tax is to be classified as an excise." *Hale v. Iowa State Bd. of Assessment & Review*, 302 U.S. 95, 104-05, 58 S. Ct. 102, 82 L. Ed. 72 (1937) (citing cases); *see also Thorpe v. Mahin*, 250 N.E.2d 633, 635-36 (Ill. 1969) (discussing U.S. Supreme Court and other authorities that hold an income tax generally is regarded as an excise tax); Dkt. No. 47D (City's Mot. for Sum. J.) at 18. Further, the City, in briefing and oral

PACIFICA LAW GROUP LLP
1191 SECOND AVENUE
SUITE 2000
SEATTLE, WASHINGTON 98101-3404
TELEPHONE: (206) 245-1700
FACSIMILE: (206) 245-1750

argument, pointed to Washington Supreme Court precedent holding a tax on gross income of a business to be an excise tax and not a property tax, and analogized the City's tax on "total income" to the holding and reasoning in that case. *See* Dkt. No. 47D at 20 (citing *State ex rel. Stiner v. Yelle*, 174 Wash. 402, 407, 25 P.2d 91 (1933)). Moreover, the City expressly recognized Washington Supreme Court precedent on the issue and put forth a good faith argument for modification or reversal of that case law. *See id.* at 19-20 (discussing why *Jensen v. Henneford*, 185 Wash. 209, 53 P.2d 607 (1936), was wrongly decided); Dkt. No. 67 (City's Reply Br.) at 25-27 (discussing why *Cary v. City of Bellingham*, 41 Wn.2d 468, 250 P.2d 114 (1952), did not apply to the Ordinance). While this Court ultimately disagreed with the City, the arguments put forth are far from frivolous. *See Bryant*, 119 Wn.2d at 219-20 ("Complaints which are . . . 'warranted by . . . a good faith argument for the . . . reversal of existing law' are not 'baseless' claims."). This Court would not have taken the extensive time and care in considering this case that it did, reading over a thousand pages of briefing, hearing three hours of oral argument, expressly declining to rule from the bench because of the importance of the arguments and issues, and issuing a 26-page Order, if the City's arguments did not raise serious questions of law.

Further, whether or not the Ordinance was "written like an excise tax" is of no consequence. Mot. at 5. There is no legal requirement that an excise tax must be written in any specific way. To the contrary, courts *ignore* how legislative language classifies a tax and examine the contents of the measure to determine the true nature of the tax. *See Wash. Pub. Ports Ass'n v. State, Dep't of Revenue*, 148 Wn.2d 637, 650, 62 P.3d 462 (2003) (ignoring label and examining characteristics of tax to determine it was an excise, not a property, tax); *Harbour Village Apartments v. City of Mukilteo*, 139 Wn.2d 604, 607, 989 P.2d 542 (1999) (the

PACIFICA LAW GROUP LLP
1191 SECOND AVENUE
SUITE 2000
SEATTLE, WASHINGTON 98101-3404
TELEPHONE: (206) 245-1700
FACSIMILE: (206) 245-1750

"character of a tax is determined by its incidents, not by its name") (quoting *Jensen*, 185 Wash. at 217). And while it is not relevant to the legal issues, Kunath is simply wrong that the City created the excise tax argument *post hoc*. The City expressly referenced and cited its excise tax authority in the Ordinance itself. *See* Dkt. No. 47E, Ex. A at 4 (the City "also has the authority to impose excise taxes for any lawful purpose and on any lawful activity, provided by RCW 35A.11.020, 35.22.280(3) . . . .").

Finally, imposing CR 11 sanctions does not further the purposes of the Rule here. The elected officials of Seattle enacted a law to fund public investments, squarely within their legislative and executive policy setting role. While the City understood it might face legal challenges, it acted in good faith that it had a legal basis to enact the Ordinance. That the City defended itself in Court by articulating its legal rationale is hardly the type of abuse of the judicial process at which CR 11 is aimed. And to the extent Kunath suggests that the City's process leading up to and enactment of the Ordinance itself was improper, such conduct is not subject to CR 11 sanctions. Kunath fails to carry his burden of meeting the high threshold required for CR 11 sanctions.

B. Kunath's motion is based on speculation and irrelevant facts and is brought for an improper purpose.

Rather than focus on CR 11 law and standards, Kunath's motion contains irrelevant and baseless conjecture and argument. First, Kunath suggests sinister motivations by noting that elected City Attorney Pete Holmes did not personally sign the filings in this case. But there is no requirement that he do so. CR 11 itself states: "Every pleading . . . shall be . . . signed by at least *one* attorney of record." CR 11(a) (emphasis added). A simple examination of the City's filings and notices of appearance show that the City's attorneys of record are both the City Attorney's Office (as indicated by the text "PETER S. HOLMES, SEATTLE CITY ATTORNEY" in the signature

PACIFICA LAW GROUP LLP
1191 SECOND AVENUE
SUITE 2000
SEATTLE, WASHINGTON 98101-3404
TELEPHONE: (206) 245-1700
FACSIMILE: (206) 245-1750

block) and the City's outside counsel Pacifica Law Group LLP. Both represent the City equally in this action. All filings have been signed by at least one attorney of record, and the name of the Assistant City Attorney who has appeared in this case, Kent Meyer, plainly is listed in the signature block as well. There is no legal requirement that Mr. Holmes personally sign. Nor is there any significance in the fact that he did not sign. The City Attorney's Office handles hundreds of cases a year, and the elected head of the Office does not personally review and sign the thousands of related filings, similar to how Washington State Attorney General Bob Ferguson does not personally review and sign every filing made with his office's name on it. That the City Attorney's Office acts through its attorneys of record in a case is normal and regular conduct. Kunath's suggestion otherwise is baseless.

Second, Kunath suggests that the City relied on a publicly-disseminated memorandum from the Economic Opportunity Institute as its sole legal basis for the Ordinance in attempt to imply that the City did not adequately research the issues. Again, there is no basis in fact for this assertion. The legal advice the City received from its attorneys prior to enacting the Ordinance is privileged and the City will not discuss it here. But, as has been pointed out in many filings to this Court, the potential legal challenges to the Ordinance prior to its passage were no secret and the City is not in the business of passing laws that might be challenged without consulting its legal counsel. That the City deeply researched and put forth substantive legal arguments is clear from its dispositive motion briefing. Further, as Kunath acknowledges, the City made different legal arguments from those in the Economic Opportunity Institute memorandum, supporting the conclusion that the City did not rely on the memorandum as its sole basis in enacting the Ordinance.

Third, Kunath asserts—again without any basis—that the City took the "unusual" step of

PACIFICA LAW GROUP LLP
1191 SECOND AVENUE
SUITE 2000
SEATTLE, WASHINGTON 98101-3404
TELEPHONE: (206) 245-1700
FACSIMILE: (206) 245-1750

hiring outside counsel in this case. But hiring outside counsel is not unusual. Indeed, that the City has done so 60 times this year is public knowledge.[1]

Finally, Kunath's reference to Richard Conlin's statement during the 2013 City Council race is factually and legally irrelevant. Mot. at 3. Mr. Conlin is not currently on the City Council and had no part in enacting the Ordinance. Further, as Kunath knows from the briefing in this case, even if he were on the Council, Mr. Conlin's individual statements are not relevant. *See Watson v. City of Seattle*, 189 Wn.2d 149, 162, 401 P.3d 1 (2017) ("Statements by 'individual legislator[s] do[] not show legislative intent." (quoting *State ex rel. Citizens Against Tolls v. Murphy*, 151 Wn.2d 226, 238, 88 P.3d 375 (2004)); *id.* (refusing to consider pro-gun-control statements by the City Council's members as evidence that the City's ordinance was "part of a broader regulatory scheme to limit gun access").

Beyond his baseless allegations and speculation, Kunath's motion is troubling in that his request for sanctions appears to be motivated by a desire to prevent the City from pursuing its appeal as of right. Specifically, Kunath states that sanctions may not be appropriate "[i]f the City formally accepts the Court's decision" and "[b]y the same token, if the City responds by continuing to make the same false claim, that should be considered as well." Mot. at 1, 6. This can be read as a threat to the City: filing an appeal should result in sanctions. Kunath is transparent in this message by noting that Seattle has a new mayor and "it will be Mayor Durkan's decision whether to continue the City's arguments on appeal, and the Court may well consider the City's decision in exercising its discretion on this motion." Mot. at 1. In essence, Kunath is saying the City should be punished if it exercises its right to seek an appeal. RAP 2.2. But the City's choice to appeal as of right is not sanctionable. *See, e.g.*, *Carrillo v. City of Ocean*

[1] *See* Seattle City Clerk's Office Consultant List, *available at* http://clerk.seattle.gov/~scripts/nph-brs.exe?s1=&s2=law&s3=&Sect4=AND&l=20&Sect5=CCDB1&Sect6=HITOFF&d=CCDB&p=1&u=%2F~public%2Fccdb1.htm&r=0&f=S (last visited Dec. 3, 2017).

PACIFICA LAW GROUP LLP
1191 SECOND AVENUE
SUITE 2000
SEATTLE, WASHINGTON 98101-3404
TELEPHONE: (206) 245-1700
FACSIMILE: (206) 245-1750

Shores, 122 Wn. App. 592, 619, 94 P.3d 961 (2004) ("In determining whether an appeal is frivolous . . . [the court considers whether a] civil appellant has a right to appeal."). Kunath's attempt to unduly influence the legal process through a CR 11 motion is improper, itself contrary to CR 11, and should be rejected.

VI. CONCLUSION

Kunath fails to meet the high burden required for imposition of CR 11 sanctions. The City put forth legal arguments that, while ultimately unsuccessful in this court, were based in law and good faith. Kunath's speculation otherwise and desire to prevent the City from seeking an appeal are improper and irrelevant. The City respectfully requests that the Court deny Kunath's Motion for Sanctions.

I certify that this memorandum contains 2,878 words, in compliance with the Local Civil Rules.

DATED this 4th day of December, 2017.

PACIFICA LAW GROUP LLP

By: */s/ Gregory J. Wong*
Paul J. Lawrence, WSBA # 13557
Gregory J. Wong, WSBA #39329
Jamie L. Lisagor, WSBA #39946

PETER S. HOLMES
SEATTLE CITY ATTORNEY

By: Kent Meyer, WSBA #17245
Assistant City Attorney

Hugh D. Spitzer WSBA # 5827

Attorneys for Defendants

PACIFICA LAW GROUP LLP
1191 SECOND AVENUE
SUITE 2000
SEATTLE, WASHINGTON 98101-3404
TELEPHONE: (206) 245-1700
FACSIMILE: (206) 245-1750