LAW OFFICES OF
ROBINSON WATERS & O'DORISIO, P.C.

April 19, 2013

John R. Duval, City Attorney
City of Loveland
500 East Third Street, Suite 330
Loveland, Colorado 80537

Kim Schutt, Esq.
Kent N. Campbell, Esq.
Wick & Trautwein LLC
323 South College Avenue, Suite 3
P.O. Box 2166
Fort Collins, Colorado 80522

Re: **CONFIDENTIAL SETTLEMENT OFFER PURSUANT TO C.R.E. 408**
City of Loveland v. William T. Beierwaltes et al.

Dear Mr. Duval, Ms. Schutt and Mr. Campbell:

I am writing on behalf of my clients, William and Lynda Beierwaltes, in response to the City of Loveland's settlement offer.

Because we both spent several hours negotiating with two Court of Appeals judges and arrived at a consensus number of $560,000, we were surprised by Loveland's counter offer of $610,000. It was our understanding that Mr. Duval was going to present the $560,000 proposal to the City Council with the message that the number was supported by two appellate judges and that there was general support by both parties. As a result, we do not know why the appellate recommendation was rejected.

In your response to my clients, you did not provide any reasoned basis for Loveland to summarily reject the recommendation of two experienced appellate judges. Because there was no explanation, we believe there may be a lack of understanding by everyone about the history of the transaction. We are hopeful that with a more complete understanding, the Council will appreciate why the appellate judges' recommendation was (and is) reasonable, logical and consistent with the facts of this case and Colorado law.

As part of our goal of openly sharing the thoughts behind the proposal now on the table, I think it is important to explain why we are where we are today. In 2008, Mr. and Mrs. Beierwaltes signed a written agreement to guaranty the obligation to re-pay Loveland up to $500,000. The plain terms of the written agreement created a financial obligation payable in 2013 (and not before). My clients have never disputed their responsibility and were extremely

surprised when Loveland initiated a lawsuit seeking early repayment. By making an uncontested obligation the subject of legal proceedings, the City has caused all parties to incur substantial legal fees that do not benefit anyone except lawyers.

Closure is important to my clients because they have done everything in their power to comply with the written agreements with both Loveland and Russound. They have also done everything they could to protect the job opportunities they worked with the City to create. When it became apparent that the company would not survive the economic crisis, they transferred the business to Russound, a viable new owner, and did not receive any money for the transfer. After that, Russound employed people for years who would have otherwise lost their jobs.

Since this dispute first arose, my clients have worked hard to preserve their relationship with Loveland and have consciously sought to avoid acrimony. We have been very candid about our goal of achieving a negotiated resolution throughout this process. That goal remains the same to the present day. The resolution offered to Loveland now is the product of good faith negotiations. It encompasses an appreciation of the input from two neutral appellate jurists. Loveland's rejection of the mediation number, the mediation process, and the reasoning of the appellate judges is therefore hard to understand. We have never understood exactly why Loveland elected litigation over negotiation at the outset. The choice to litigate literally forced my clients into expensive proceedings where they had to resist Loveland's claims in order to preserve their rights against Russound. We again urge you to adopt a conciliatory approach now so that all parties can stop spending money on legal fees.

A settlement on the mediators' terms reflects our clients' mutual interests in eliminating future legal fees and honors the letter and spirit of our clients' prior agreements. If Loveland accepts the current proposal, it will receive reimbursement for all of its outside legal fees as well as a market return on its investment. As explained below, the resolution also provides certainty and eliminates considerable appellate risk. For these reasons, we ask Loveland to reconsider the resolution recommended by Judge Plank and Judge Roy.

A. BACKGROUND

On March 28, 2008, the City of Loveland and the Beierwaltes Parties entered into the Colorado vNet Incentive and Performance Agreement" (the "Incentive Agreement"). Loveland entered into the Incentive Agreement because it wanted to help Colorado vNet consolidate its operations in Loveland to provide more jobs and to increase revenue.

The parties' 2008 bargain was simple. Loveland agreed to an economic incentive to be used by the Beierwaltes Parties to relocate its Longmont offices and facilities to the Loveland headquarters. In exchange, Colorado vNet agreed either to employ at least 250 employees by December 31, 2012 or to pay back up to $500,000 of the economic incentives paid by Loveland. The Incentive Agreement specifically required the Beierwaltes Parties to employ 250 people by the end of 2012. If that did not happen, the Beierwaltes Parties agreed to pay back up to $500,000 in February of 2013. There is nothing in the contract that requires the Beierwaltes Parties to make any payment to Loveland until February of 2013.

Loveland received everything it bargained for in the first part of its agreement – Colorado vNet moved its Longmont manufacturing operation to its new Loveland site that it paid to remodel in September of 2008. Jobs were created. Until very recently, jobs were preserved. Even though Loveland received what it bargained for, and Colorado vNet employed a number of people, we all agree that it did not reach the 250-employee target by December 31, 2012. Because the Incentive Agreement says that the Beierwaltes Parties owe Loveland $500,000, my clients have agreed to pay the contractual amount.

Loveland should have waited until 2013 to seek payment. If it had, there would be no litigation and no legal fees. Instead, Loveland filed suit on December 21, 2010, seeking payment more than two years before the contractually-agreed re-payment date.

Colorado vNet was forced out of business because the economic downturn made it impossible for Colorado vNet to continue operating. The losses were simply too great to sustain. Russound assumed almost all of Colorado vNet's assets and liabilities on October 15, 2009. Colorado vNet was fortunate that Russound agreed to take over its business, keep the Loveland operations going, and keep people working. If Colorado vNet had not found a new owner, it would have shut down. The pressures facing Colorado vNet in 2009 were severe. The market for high-end entertainment and automation equipment had tightened with the downturn, and Colorado vNet could not survive without a complete restructure.

Before the Russound transaction closed, my clients worked hard to ensure that Russound would honor the terms of the Incentive Agreement. Russound's representatives met with the Beierwalteses and the City of Loveland and promised to continue operating in Loveland, to grow the business, and to hire more people. Russound did in fact keep people employed for years – people who would have certainly lost their jobs in 2009 otherwise.

As part of the assignment to Russound, Russound specifically agreed to honor all obligations owed to Loveland. This transaction was a clear win for the City. Russound agreed to preserve jobs. Russound agreed to honor all of the terms of the Incentive Agreement. The Beierwalteses agreed to be co-guarantors to the City if the employment goals were not met. They never removed themselves from the equation. Therefore, after the assignment, there were even more resources to carry the financial obligations. Loveland's interests would have had increased protection. In addition to sharing the financial obligation, Mr. and Mrs. Beierwaltes did everything they could to secure Loveland's written consent to the assignment.

Mr. Beierwaltes first sought Loveland's consent in October of 2009. Loveland did not reject the assignment and did not provide written consent. Colorado vNet could not afford to wait to close on the restructure. It wanted to protect the business and save jobs for its employees. Because the City was unable to respond quickly, Colorado vNet and Russound closed without Loveland's written consent with a commitment by the Beierwalteses and Russound to seek closure on this issue with Loveland.

After the transfer to Russound closed, Loveland began a lengthy review process. Five months after the closing, John Duval wrote counsel for the Beierwalteses to advise of the status. He noted that the transfer to Russound was closed without formal written consent from Loveland and explained "as we recently discussed on the phone, City Manager Don Williams and I are certainly willing to meet with you and Mr. Beierwaltes to discuss this matter further before the City files suit against vNet LLC and the Beierwaltes." The City subsequently recognized the value of the Russound transfer.

A year after the closing, the City Council issued a resolution approving the assignment. That resolution was subsequently revoked when Russound did not sign the letter of credit it agreed to provide. Mr. and Mrs. Beierwaltes did not do anything to interfere with the resolution and are not responsible for the fact that Russound reneged.

B. ISSUES ON APPEAL

The main issue on appeal is whether the Incentive Agreement provides Loveland with the right to repayment before February 1, 2013 in spite of the express language regarding the repayment date. Related issues are whether any prejudgment interest is owed and whether the assignment is effective notwithstanding Loveland's revoked consent.

1. Did Loveland File Suit for Payment Prematurely?

Whether or not Loveland's claims were ripe when it sued the Beierwalteses is of critical importance in the appeal. Loveland prevailed at the trial court on the basis of its claim that Colorado vNet failed to obtain prior written consent before the Russound transaction closed. However, the trial court's decision is not consistent with precedent. When Loveland's suit was filed in 2010, the business was operating. And, most importantly, Mr. and Mrs. Beierwaltes never repudiated their obligation to personally guaranty payment if the goal of 250 employees was not reached by the end of 2012. The payment now being offered provides Loveland with the full benefit of its bargain. Since Loveland had not been deprived of any benefit of its bargain in 2010 when it filed suit, its claim was not ripe when filed.

The Beierwaltes Parties acknowledge that they did not have Loveland's written consent before closing but they had no choice as the City could not move fast enough and the transfer had to take place in order to save jobs. After Loveland completed its diligence, written consent was in fact obtained (and later revoked). Whether these circumstances constitute a breach at all, and, if so, whether it is a material breach, are issues that an appellate court may very well decide against the City.

2. Is the Assignment Effective Notwithstanding Loveland's Revocation of Consent?

As you know, there is abundant precedent supporting my clients' view that the assignment to Russound should be effective even without formal written consent from Loveland, particularly where there were reasons for the assignment that were beneficial to Loveland and the

public. The public purpose supporting consent to the assignment was acknowledged and documented by Loveland's City Council on October 19, 2010, when it consented to the assignment:

> WHEREAS, the City Council believes that execution of the Agreement will further the public purposes of resolving the parties' dispute under the 2008 Agreement and providing the social and economic benefits to the citizens of Loveland in the form of jobs, economic development, and increased property tax revenues to the City that were served by the 2008 Agreement, and, therefore, this Agreement is in the best interest of the pubic and the City.

We acknowledge there are two points of view and that there are also risks that the appellate court will agree with the trial court. Indeed, this is one reason why we reached a decision during the mediation to make an offer above $500,000. But because this could be decided either way, we do ask that Loveland proceed with negotiations with a view toward eliminating the risk of uncertainty to both sides that we now have with appellate proceedings pending.

3. Is Loveland Entitled to Prejudgment Interest and Attorneys' Fees?

The trial court's award of prejudgment interest is almost certain to be reversed even if Loveland prevails on other appellate issues. As to the claim for attorneys' fees, these fees were incurred as the direct result of Loveland's unilateral decision to sue. Because the legal obligation to Loveland was self-imposed, Loveland has a high risk on appeal of losing any fee award.

To be sure, there are also risks to my clients. That is why, with the input of judges from the Court of Appeals, my clients made an offer that fully compensates Loveland for the outside legal fees it chose to incur. We do ask that Loveland acknowledge this substantial compromise by my clients. My clients' offer also provides Loveland with a return on its investment that is consistent with the market. In addition, if Loveland accepts the current offer, Loveland will have created a greater recovery than it would have received if the assignment never happened.

My clients hereby renew their offer to resolve this matter for $560,000. Please ask the City Council to consider this offer closely and to weigh the time, costs, and risks on appeal. Neither the City nor my clients have money to waste. We respectfully submit that the best use of both sides' resources is to settle on the terms recommended and supported by Judge Plank and Judge Roy.

Thank you in advance for your efforts to resolve this matter and I look forward to hearing from you.

Sincerely,

Tracy L. Ashmore