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<b>District Court, Larimer County, Colorado</b> Larimer County Justice Center; 201 La Porte Avenue, Suite 100, Fort Collins, CO 80521 Phone: (970) 494-3500	▲ COURT USE ONLY ▲
<b>Plaintiff, Pro Se:</b> RORY HEATH AS AN INDIVIDUAL PLAINTIFF AND ON BEHALF OF OTHER CONCERNED RESIDENTS AND PARTIES,  v.  <b>Defendants:</b> CITY OF FORT COLLINS CITY COUNCIL; CITY OF FORT COLLINS, RIPLEY DESIGN, INC.; ELIZABETH STREET CO. OWNER, LLC	
Andrew S. Priebe, Attorney Reg. #47905 Vahrenwald, McMahon, Massey & Mitchell, LLC 125 S. Howes Street, Suite 1100 Fort Collins, CO 80521 <b>Attorneys for Defendant Ripley Design, Inc.</b> Phone Number: (970) 482-5058 FAX Number: (970) 482-5175 E-Mail: andrew@vmmmlaw.com	<b>Case Number: 18CV125</b>  <b>Courtroom: 5A</b>
<b>REPLY TO PLAINTIFF'S RESPONSE TO DEFENDANT'S MOTION TO DISMISS FOR FAILURE TO STATE A CLAIM UPON WHICH RELIEF MAY BE GRANTED</b>	

**COMES NOW** Defendant Ripley Design, Inc., a Colorado corporation (“**Ripley**”), by and through its counsel, Vahrenwald, McMahon, Massey & Mitchell, LLC, Andrew S. Priebe appearing, and submits this Reply to Plaintiff’s Response to Defendant’s Motion to Dismiss for Failure to State a Claim Upon Which Relief May Be Granted (the “**Response**”), and states as follows:

1. As stated in the Motion to Dismiss for Failure to State a Claim Upon Which Relief May be Granted filed by Ripley on August 17, 2018 (the “**Motion**”), C.R.C.P. 12(b)(5) permits dismissal for “failure to state a claim upon which relief can be granted.” In motions to dismiss, “all averments of material fact must be accepted as true, and all of the allegations in the complaint must be viewed in the light most favorable to the plaintiff.” *Public Service Co. of Colo. v. Van Wyk*, 27 P.3d 377, 385 (Colo. 2001). However, “recitals, generalizations, legal conclusions, and conclusions of the pleader” do not suffice. *Kilpatrick v. Miller*, 135 P. 780, 782 (Colo. 1913).

2. Colorado has adopted the plausibility standard as articulated in *Bell Atl. Corp. v. Twombly*, 550 U.S. 544 (2007) and *Ashcroft v. Iqbal*, 556 U.S. 662 (2009). See *Warne v. Hall*, 373 P.3d 588, 595 (Colo. 2016). Accordingly, a complaint must state a plausible claim for relief in order to survive a motion to dismiss. *Id.* “A claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged.” *Iqbal*, at 678. The plausibility standard is not akin to a “probability requirement,” but it asks for more than a sheer possibility that a defendant has acted unlawfully. *Twombly*, at 556. The “court may only consider matters stated within the complaint itself and may not consider information outside of the confines of that pleading.” *Van Wyk*, at 386. Matters outside the pleadings, however, do not include a document referred to in the complaint, notwithstanding that the document is not formally incorporated by reference or attached to the complaint. *Walsenburg Sand & Gravel Co., Inc. v. City Council of Walsenburg*, 160 P.3d 297, 299 (Colo. App. 2007).

3. The Response contains nothing but recitals, generalizations, legal conclusions, conclusions of the pleader, and conjecture. In fact, the Response centers around one hypothetical question, “What interest does Ripley have in the Project?”

4. The Plaintiff has provided no proof whatsoever that Ripley has ownership in the Project (as defined in the Complaint), and therefore is an indispensable, necessary, and appropriate party to this action. Rather, Plaintiff uses generalizations, conjecture and hypothetical questions to draw the conclusion that it is Ripley’s duty to provide additional information and documentation to prove its lack of ownership or other interest in the Project.

5. The legal standards regarding motions to dismiss do not place such a burden on a defendant, such as Ripley. Rather, it is Ripley’s duty in such a motion to test the sufficiency of the Plaintiff’s Complaint, considering only the matters stated in the Complaint itself and not considering information outside the confines of the pleading. *Van Wyk*, at 385, 386. Therefore, it is the Plaintiff’s duty to provide enough facts and information in the pleadings to survive a motion to dismiss. Plaintiff has not met his burden of stating a plausible claim against Ripley based on the information contained in the Complaint.


6. Ripley reiterates the claims and arguments contained in the Motion. There is no facial plausibility to Plaintiff’s claims against Ripley as a defendant in this action.

**WHEREFORE**, Ripley requests that the Court GRANT Ripley’s Motion to dismiss all claims against it and that the Court order Ripley be removed as a party to this action. Ripley requests its attorney’s fees and requests such other and further relief as the Court deems just and proper under the circumstances.

DATED this 17<sup>th</sup> day of September, 2018.

Respectfully submitted,

**VAHRENWALD, McMAHILL, MASSEY &  
MITCHELL, LLC**

By:   
Andrew S. Priebe, Reg. No. 47905  
**Attorney for Defendant, Ripley Design, Inc.**

**CERTIFICATE OF SERVICE**


The undersigned hereby certifies that on the 17<sup>th</sup> day of September, 2018, a true and correct copy of the above and foregoing document was served on the following:

Mr. Rory Heath  
*Plaintiff*  
2831 Ridgeglen Way  
Colorado Springs, CO 80918  
*Via First Class Mail*

City of Fort Collins  
John Duval  
Attorney for the Defendant City of Fort Collins  
*Via e-service*

Kimberly B. Schutt  
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Outside counsel for the Defendant City of Fort Collins  
*Via e-service*

Elizabeth St Owner CO, LLC  
Sean M. Hanlon  
Jessica J. Smith  
Attorneys for Defendant Elizabeth Street Co. Manager, LLC  
*Via e-service*

  
Julia Sampley, Legal Assistant