

DISTRICT COURT, EL PASO COUNTY, COLORADO 270 South Tejon Street P.O. Box 2980 Colorado Springs, CO 80901	
CASAS LIMITED PARTNERSHIP #4, a Colorado Limited Liability Partnership, and IQ INVESTORS< LLC, a Colorado Limited Liability Company, Plaintiffs v. PARK FOREST WATER DISTRICT, Defendant	
Attorneys for Defendant: MacDougall & Woldridge, P.C. Julianne M. Woldridge, Reg. No. 17772 1586 S. 21 st Street, Suite 200 Colorado Springs, CO 80904 Phone: (719) 520-9288 email: jwoldridge@waterlaw.tv	Case No.: 2017CV32161
DEFENDANT’S REPLY REGARDING ITS MOTION TO DISMISS AND RESPONSE TO AMENDED COMPLAINT	

Defendant, through its attorneys, hereby replies regarding its Motion to Dismiss Complaint and moves for entry of judgment on Defendants’ Motion to Dismiss the Complaint, and responds to Plaintiffs’ Amended Complaint, and states:

1. Pursuant to C.R.C.P. 121, section 1-15 (8), Defendant’s counsel certifies that she discussed the possibility of an amended complaint with Plaintiffs’ counsel, but did not consent to an amendment. Defendant’s counsel informed Plaintiffs’ counsel that the pending motion to

dismiss for lack of subject matter jurisdiction had to be responded to regardless of an amendment.

2. On September 1, 2017, Plaintiffs filed their Complaint in this matter. The Complaint is not verified.

3. On November 13, 2017, Defendant filed its responsive pleading – a motion to dismiss the Complaint for lack of subject matter jurisdiction pursuant to C.R.C.P. 12 (b) (1).

4. The deadline for Plaintiffs to respond to the motion to dismiss was December 11, 2017. On December 11, 2017, Plaintiffs filed an Amended Complaint. The Amended Complaint is not verified. Plaintiffs did not respond to Defendant's Motion to Dismiss. Plaintiffs did not seek leave or consent to amend their Complaint.

5. C.R.C.P. 15 (a) allows for amendment of a complaint:

as a matter of course at any time before a responsive pleading is filed or, if the pleading is one to which no responsive pleading is permitted and the action has not been placed upon the trial calendar, he may so amend it any time within 21 days after it is filed. Otherwise, a party may amend his pleading only by leave of court or by written consent of the adverse party; and leave shall be freely given when justice so requires.

6. Plaintiffs did not comply with C.R.C.P. 15 (a). A responsive pleading to the original Complaint had already been filed and it has been more than 21 days since the original Complaint was filed. Plaintiffs did not request or obtain leave of this Court or written consent of Defendant to file the Amended Complaint.

7. Plaintiffs did not respond to Defendant's Motion to Dismiss for lack of subject matter jurisdiction and by failing to do so have confessed that motion with respect to the

claims in the Complaint and the first claim for relief in the Amended Complaint which is merely a restatement of the same claim in the original Complaint. *See* C.R.C.P. 121, section 1-15 (3) (2017) (“Failure of a responding party to file a responsive brief may be considered confession of the motion.”). Despite bearing the burden to prove subject matter jurisdiction, Plaintiff provided no factual or legal response to Defendant’s motion to dismiss. *See Tidwell v. City and County of Denver*, 83 P.3d 75, 85 (Colo. 2003) (Plaintiff has the burden to prove subject matter jurisdiction).

8. Plaintiff’s Amended Complaint drops several claims originally asserted as “breach of contract” claims, confessing that the court lacked subject matter jurisdiction for those claims as stated in Defendant’s Motion to Dismiss (breach of contract for failing to pay for damage to property, breach of contract for failing to provide domestic water service, failing to maintain facilities, and breach of Defendant’s rules and regulations). The dismissal of these claims should include terms and conditions as the Court deems proper. C.R.C.P. 41 (a) (2). Defendant requests as terms and conditions an award of its costs and reasonable fees incurred to respond to these claims, in an amount to be established.

9. Defendant is entitled to have the Amended Complaint dismissed for failure to comply with C.R.C.P. 15 (a). C.R.C.P. 41 (b) (1). Recognizing that the Court has discretion to allow amendment to cure subject matter jurisdiction issues, *Stuart v. The Frederick R. Ross Investment Co.*, 773 P.2d 1107, 1110 (Colo. App. 1988), Defendant responds to the Amended Complaint as stated below.

10. The Amended Complaint merely restates its claim for breach of agreement stated in the original Complaint without Plaintiffs meeting their burden to prove subject matter jurisdiction. Plaintiffs have the burden to prove subject matter jurisdiction. *See Tidwell*, 83 P.3d at 85. By not responding to Defendant's Motion to Dismiss this claim regardless of how it is phrased in either the Complaint or the Amended Complaint, Plaintiffs have confessed the motion to dismiss this claim with prejudice for lack of subject matter jurisdiction. Defendant incorporates herein its Motion to Dismiss the Complaint in response to the Amended Complaint and requests that all claims in the original Complaint and the First Claim for Relief as stated in the Amended Complaint be dismissed with prejudice for lack of subject matter jurisdiction.

11. Plaintiffs' Amended Complaint asserts a second claim for relief for unjust enrichment, but does not provide any additional factual allegations other than what is contained in the original Complaint. Defendant incorporates herein its Motion to Dismiss the Complaint in response to the Amended Complaint and requests that the Second Claim for Relief as stated in the Amended Complaint be dismissed with prejudice for lack of subject matter jurisdiction. This claim is based on alleged representations by Defendant that overlap with the Inclusion Agreement between the parties and not reliance on a duty set out in the Inclusion Agreement. A claim for unjust enrichment relying on allegations of misrepresentation inducing conduct are based on tortious conduct and are subject to the subject matter jurisdiction restrictions of the Colorado Governmental Immunity Act. *Robinson v. Colorado State Lottery Div.*, 179 P.3d 998, 107-108 (Colo. 2008). Plaintiffs'

claim for unjust enrichment, therefore, should be dismissed with prejudice for lack of subject matter jurisdiction.

Defendant, therefore, requests an order from the Court:

a. declaring that Plaintiffs have confessed Defendant's Motion to Dismiss the Complaint and awarding it reasonable costs and fees to be determined as condition of dismissal of the claims in the Complaint;

b. dismissing the claims in the Amended Complaint with prejudice for lack of subject matter jurisdiction.

Dated: December 18, 2017.

MacDougall & Woldridge, P.C.

A handwritten signature in black ink, appearing to read "Julianne M. Woldridge". The signature is written in a cursive, flowing style.

By:

Julianne M. Woldridge, # 17772

Certificate of Service

The undersigned hereby certifies that a true and correct copy of the DEFENDANT'S REPLY REGARDING ITS MOTION TO DISMISS AND RESPONSE TO AMENDED COMPLAINT was served on the following this 8th day of December 2017 via Colorado E-Filing:

Party Name	Attorney Name
CASAS Limited Partnership #4 IQ Investors, LLC	Allison Mikulecky Stephen Andrew Hess (Sherman and Howard LLC)

