

<p>DISTRICT COURT, CITY AND COUNTY OF DENVER, STATE OF COLORADO 1437 Bannock Street Denver, Colorado 80202</p>	
<p><b>Plaintiffs:</b> ARTHUR KEITH WHITELOW, III, JOHN DERUNGS, KATHERINE K. McCRIMMON, LAURA PITMON, DENISE SIGON f/k/a DENISE L. SAGER, and ALAN and RITA SINGER</p> <p><b>v.</b></p> <p><b>Defendants:</b> THE DENVER CITY COUNCIL (including the individual Council members in their official capacity, Albus Brooks, Robin Kniech, Peggy Lehmann, Paul Lopez, Judy H. Montero, Chris Nevitt, Debbie Ortega, Jeanne Robb, Susan Shepherd, Mary Beth Susman); THE MANAGER OF COMMUNITY PLANNING AND DEVELOPMENT (Brad Buchanan, in his official capacity); THE DENVER PLANNING BOARD (including the individual board members in their official capacity, Andy Baldyga, Jim Bershof, Shannon Gifford, Renee Martinez-Stone, Brittney Morris Saunders, Joel Noble, Susan Pearch, Arleen Taniwaki, Julie Underdahl, Frank Schultz and Chris Smith); THE CITY AND COUNTY OF DENVER; and CEDAR METROPOLITAN LLC (the Property Owner/zoning Applicant).</p>	<p style="text-align: center;"><b>▲ COURT USE ONLY ▲</b></p>
<p><b><i>Attorneys for Defendant, Cedar Metropolitan LLC:</i></b> Chip G. Schoneberger, #41922 Foster Graham Milstein &amp; Calisher LLP 360 South Garfield Street, 6<sup>th</sup> Floor Denver, Colorado 80209 Phone: (303) 333-9810 Email: <a href="mailto:cschoneberger@fostergraham.com">cschoneberger@fostergraham.com</a></p>	<p>Case Number: 2015cv032427</p> <p>Courtroom: 269</p>
<p style="text-align: center;"><b>DEFENDANT CEDAR METROPOLITAN, LLC’S MOTION TO DISMISS AND RESPONSE TO MOTION FOR INTERIM DEFAULT</b></p>	

Defendant, Cedar Metropolitan, LLC, hereby moves pursuant to C.R.C.P. 4(m) to dismiss the plaintiffs’ Complaint for Relief Under C.R.C.P. 106(A)(4) and for Declaratory Judgment (“Complaint”), and further responds to plaintiffs’ Motion for Interim Default, as follows:

**Certification Pursuant to C.R.C.P. 121 § 1-15(8):** Undersigned counsel attempted to confer with plaintiffs' counsel, Gregory Kerwin, regarding this Motion to Dismiss via email sent to Mr. Kerwin on September 8, 2015 at 3:26 p.m. Mr. Kerwin never responded to the undersigned's email and, instead, filed a Motion for Interim Default less than an hour later. Nor did counsel for plaintiffs confer with the undersigned regarding his Motion for Interim Default despite acknowledging in his affidavit that the undersigned's law firm represents Cedar Metropolitan.

### **Introduction**

Plaintiffs filed this lawsuit on July 6, 2015, seeking judicial review of a zoning decision by the Denver City Council, and duplicative declaratory judgment relief regarding that decision. Plaintiffs failed to file anything with the Court purporting to establish service of the Summons and Complaint on either party until a month later, on August 6, 2015. What is more, the "Return of Service" plaintiffs filed on August 6 is executed *by plaintiffs' own counsel*, Mr. Kerwin, who professes to have served his own Civil Summons and Complaint documents on Cedar Metropolitan.

Plaintiffs' attempt to have their own counsel serve the Summons and Complaint on Cedar Metropolitan is ineffective under Colorado law. As a result, plaintiffs failed to timely serve Cedar Metropolitan within the 63 days required by C.R.C.P. 4(m) and thus the Complaint should be dismissed. And, consequently, the Court should also deny plaintiffs' Motion for Interim Default, and grant Cedar Metropolitan its reasonable attorney fees.

### **Argument**

#### **I. Service by Plaintiffs' Own Attorney is Ineffective and thus the Court Should Dismiss Plaintiffs' Complaint for Failing to Properly and Timely Serve Cedar Metropolitan**

It has been well-settled in Colorado for over a century that "[n]either a plaintiff, defendant, *nor attorney representing a party* is competent to serve process." 1B Colo. Prac., Methods of Practice § 26:3 (6th ed.) (emphasis added). *See also* 6 Colo. Prac., Civil Trial Practice § 3.12 (2d ed.) ("[t]he attorney of record for the plaintiff also lacks authority to serve a summons"); *Nelson v. Chittenden*, 123 P. 656, 659 (Colo. 1912) ("the attorney of record was without authority to serve the summons"); *People In Interest of T.G.*, 849 P.2d 843, 844 (Colo. App. 1992) (same).

This is because C.R.C.P. 4(d) precludes service by "a party to the action," and the Colorado Supreme Court interpreted such language long ago and held it "was never intended to authorize the service of summons by the attorneys in the case." *Nelson*, 123 P. at 659.

Here, plaintiffs' counsel, Mr. Kerwin, executed a "return of service" in which he professed that: (1) "I am counsel of record for Plaintiffs in this case"; (2) "I personally served

copies of ... the documents on Defendant Cedar Metropolitan, LLC”; and (3) “I effected personal service of the ... documents ... on Cedar Metropolitan, LLC[.]” (Pl’s Return of Serv. at ¶¶ 1, 2, 5). Such service by plaintiffs’ counsel is ineffective as a matter of law.

C.R.C.P. 4(m) mandates that “[i]f a defendant is not served with 63 days (nine weeks) after the complaint is filed, the court – on motion or on its own after notice to the plaintiff – *shall* dismiss the action[.]” Because plaintiffs filed their complaint on July 6, 2015 (more than 63 days ago) and has failed to properly serve Cedar Metropolitan, the Court should dismiss the complaint.

## **II. Cedar Metropolitan is Entitled to Reasonable Attorney Fees Related to Plaintiffs’ Frivolous Motion for Interim Default**

Cedar Metropolitan is entitled to an award of reasonable attorney fees and costs against plaintiffs for responding to their Motion for Interim Default, pursuant to C.R.S. § 13-17-102. Under C.R.S. 13-17-102(4), “[t]he court shall assess attorney fees if, upon the motion of any party or the court itself, it finds that an attorney or party brought or defended an action, or any part thereof, that lacked substantial justification[.]” Section 102 further explains that “‘lacked substantial justification’ means substantially frivolous, substantially groundless, or substantially vexatious.” C.R.S. § 13-17-102.

A filing is “frivolous” if the plaintiffs can present no rational argument based on the evidence or law. *Western United Realty, Inc. v. Isaacs*, 679 P.2d 1063 (Colo. 1984). Section 13-17-102(4) thus serves as an important punitive sanction to deter conduct that improperly instigates or prolongs litigation, and further serves the remedial purpose of compensating the opposing party victimized by such conduct. *In re Marriage of Aldrich*, 945 P.2d 1370, 1378 (Colo. 1997).

Here, plaintiffs’ Motion for Interim Default lacks any rational basis in law or fact because it is predicated on ineffective service of process – a defect that the Colorado Supreme Court established over a century ago and has become a basic principle of Colorado law and practice. *See Nelson*, 123 P. at 659; 1B Colo. Prac., Methods of Practice § 26:3 (6th ed.); 6 Colo. Prac., Civil Trial Practice § 3.12 (2d ed.).

WHEREFORE, defendant Cedar Metropolitan, LLC, requests this Court dismiss plaintiffs’ Complaint and grant Cedar Metropolitan its reasonable attorney fees related to plaintiffs’ Motion for Interim Default. Cedar Metropolitan also requests any further relief this Court deems just and proper.

Dated this 10th day of September, 2015.

FOSTER GRAHAM MILSTEIN & CALISHER, LLP

By: /s/ Chip G. Schoneberger

Chip G. Schoneberger

Attorneys for Defendant, Cedar Metropolitan LLC

**CERTIFICATE OF SERVICE**

The undersigned hereby certifies that on this 10<sup>th</sup> day of September, 2015, a true and correct copy of the foregoing **DEFENDANT CEDAR METROPOLITAN, LLC'S MOTION TO DISMISS AND RESPONSE TO MOTION FOR INTERIM DEFAULT** was served via ICCES upon the following:

Gregory J. Kerwin  
Gibson Dunn & Crutcher LLP  
1801 California Street, Suite 4200  
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*Attorneys for Plaintiffs*

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/s/ Dyanna Spicher

Paralegal

*Original signatures on file at the offices of Foster Graham Milstein & Calisher, LLP pursuant to C.R.C.P. 121 §1-26(7).*