

<p>DISTRICT COURT, COUNTY OF LARIMER, STATE OF COLORADO Court Address: 201 LaPorte Avenue Fort Collins, CO 80521-2761 Phone Number: (970) 494-3500</p>	
<p>CITY OF LOVELAND, a Colorado Municipal Corporation, Plaintiff.</p>	
<p>v.</p>	
<p>ROGER GOMEZ; Defendant.</p>	<p>▲ FOR COURT USE ONLY ▲</p>
<p>Attorneys for Defendant City of Loveland, a Municipal Corporation: Alicia R. Calderón, #32296 Assistant City Attorney II Derek Turner, #44091 Assistant City Attorney II Loveland City Attorney's Office 500 E. Third Street, Suite 330 Loveland, CO 80537 (970) 962-2540 Alicia.Calderon@cityofloveland.org Derek.Turner@cityofloveland.org</p>	<p>Case Number: 16CV 30703 Courtroom: 4A</p>
<p>PLAINTIFF'S REPLY IN SUPPORT OF PLAINTIFF'S MOTION TO AMEND COMPLAINT</p>	

COMES NOW the City of Loveland, a municipal home rule corporation, (the "City") by and through undersigned counsel, and requests leave of the Court to amend its Complaint pursuant to C.R.C.P. 15(a), and in reply states the following:

1. In his Response to the City's Motion to Amend Complaint, Defendant Roger Gomez misstates the facts, misinterprets the City's legal theories, and presents substantive legal and factual argument on the City's claims—arguments that are neither ripe for review nor relevant to the City's Motion to Amend.
2. The City commenced this litigation claiming ownership of "a utility easement along the southern portion of the property at 3510 W. Eisenhower Boulevard" for buried water lines and overhead electric transmission lines. Complaint, ¶8. The Complaint described the

claimed easement as “along what formerly was known as the … ‘Arkins branch’” Railroad.

3. The City claims ownership of easements for overhead power lines and underground water lines on several legal theories, any of which, if proven at trial, would defeat Defendant’s claims that the City’s utilities are a trespass or may only be acquired by condemnation.
4. The City’s Complaint legally described the area of the claimed easement as a parcel of land formerly owned by the railroad company. However, in a draft survey disclosed to Defendant in October 2016, the location of the claimed easement area is shown extending to the north of the former boundary of the Railroad parcel. Water Line Easement Legal Description and Exhibit Drawing Preliminary Survey Oct. 14, 2016, attached as **Exhibit A**. This document was disclosed to Defendant in the City’s Initial Disclosures served on October 27, 2016. *See Plaintiff’s Initial Disclosures Pursuant to C.R.C.P. Rule 26(a)(1), Oct. 27, 2016, ¶B.25*, attached as **Exhibit B**.
5. Defendant therefore received notice that the area and scope of City’s claimed water line easement included lands owned by Defendant north of the former Railroad parcel boundary line.
6. The size and scope of the easements claimed by the City are based on the location of the City’s existing and historical use of the land, and for the purposes for which the City has used such land. The City’s original complaint described a larger physical area than the surveyed easement. The City’s proposed Amended Complaint more precisely describes and corrects the legal description of the location of the claimed easements for the buried water lines and overhead power lines and includes the scope of the City’s claimed easement, based on the City’s actual historical use of the property for the claimed purposes.
7. The City’s theory that it has acquired the buried water lines by adverse possession, through open, notorious, continuous, adverse occupation of Defendant’s property, is in no way limited to the previous boundary line for the former Railroad parcel. The City claims ownership of the easements by actual possession and the amended complaint makes clear the specific legal description of the area the City claims for reasonable use for an easement for water lines.
8. As the City intends to prove at trial, the former Railroad parcel and the previously defined parcel to the north have been under common ownership for more than 45 years.
9. If, in fact, the City buried its 36-inch diameter water line outside the scope of the area permitted by the 1954 license agreement, then that fact may weigh in favor of the City’s legal theories – that the City adversely possessed and used property of another, beginning on the date the water line was buried. Whether or not the landowners of the former lot north of the former Railroad parcel boundary line had knowledge or notice of the actual location of the water lines is an issue of material fact to be determined at trial.
10. Further, as this Court previously ruled, the Railroad’s license agreements were revoked in

1971 upon sale of the former Railroad parcel to Mr. and Mrs. Miller.

11. A motion to amend a complaint “shall be freely given when justice so requires.” C.R.C.P. Rule 15(a). The rule encourages courts to look favorably on requests to amend “to secure the just, speedy, and inexpensive determination of every action.” *Eagle River Mobile Home Park, Ltd. V. District Court in and for Eagle County*, 647 P.2d 660 (Colo. 1982).
12. The City is entitled to a trial on its claims and Defendant improperly introduces legal briefing and argument, apparently seeking this Court to rule that the City’s amendment is “futile and fails as a matter of law.”
13. The City has not delayed. The City seeks leave to amend in order to update the complaint to reflect the legal description of the easements. Unlike the *Benton* case selectively cited by Plaintiff, the parties have been actively exchanging documents and engaging in discovery.. There has not been any delay. Plaintiff has had notice of the legal description since the City’s Initial Disclosures, which was further refined during the settlement process. It is more efficient to amend and reflect the actual location of the easements, rather than proceed with a less accurate legal description. “Reflecting a liberal policy toward timely amendments to pleadings, C.R.C.P. 15(a) encourages trial courts to look favorably upon motions to amend.” *Benton v. Adams*, 56 P.3d 81, 85 (Colo. 2002).
14. Allowing the City’s amendment, so that the City’s claim for the water line easement accurately reflects the location of the buried water lines and the City’s historical use of the land, will not cause prejudice to Defendant because he received notice of the location of such lines and claimed easement area since at least December 2016, and because Defendant has a full and fair opportunity to defend against the City’s claims at trial.

WHEREFORE, the City of Loveland respectfully requests that the Court enter an Order granting leave to amend the City’s Complaint and accepting Plaintiff City of Loveland’s Amended Complaint filed with the City’s Motion to Amend Complaint

Dated this 13th day of February, 2018.

CITY OF LOVELAND
Original signature on file
By: /s/ Alicia R. Calderón
Alicia R. Calderón, #32296
Assistant City Attorney

By: /s/ Derek Turner
Derek Turner, #44091
Assistant City Attorney

Loveland City Attorney’s Office
500 E. Third Street, Suite 300

Loveland, CO 80537
(970) 962-2544
Alicia.Calderon@cityofloveland.org
Derek.Turner@cityofloveland.org

CERTIFICATE OF SERVICE

The undersigned certifies that the foregoing **PLAINTIFF'S REPLY IN SUPPORT OF PLAINTIFF'S MOTION TO AMEND COMPLAINT** was served by Colorado Courts e-Service on this 13th of February, 2018 to the following:

Kathie Troutd Riley
Kathie Troutd Riley, P.C.
2903 Aspen Drive, Unit D
Loveland, CO 80538
Attorney for Defendant Roger Gomez

/s/ *Kayla Demmler*
Original signature on file

EXHIBIT A

PROPERTY DESCRIPTION **Gomez Parcel**

A parcel of land for water line easement purposes, being a part of the property described in the Special Warranty Deed as recorded March 26, 2013 as Reception No. 20130022551 of the Records of Larimer County, located in the Northwest Quarter (NW1/4) of Section Sixteen (16), Township Five North (T.5N.), Range Sixty-Nine West (R.69W.) of the Sixth Principal Meridian (6th P.M.), City of Loveland, County of Larimer, State of Colorado and being more particularly described as follows:

Commencing at the North Quarter corner of said Section 16 and assuming the North line of said Northwest Quarter as bearing N 89°36'13" W being a Grid Bearing of the Colorado State Plane Coordinate System, North Zone, North American Datum 1983/2011, a distance of 2675.10 feet with all other bearings contained herein relative thereto;

THENCE, along the Northerly line of the said Northwest Quarter N 89°36'13" W a distance of 250.00 feet;

THENCE, departing the Northerly line of the said Northwest Quarter S 00°23'47" W a distance of 80.00 feet to a point on the Southerly right-of-way line of State Highway 34 as described in Book 1563, Page 285 of the records of the Larimer County Clerk and Recorder;

THENCE, continuing S 00°23'47" W along the Easterly line of that parcel of property described in the said Special Warranty Deed recorded as Reception No. 20130022551 a distance of 451.30 feet to the POINT OF BEGINNING.

THENCE, continuing S 00°23'47" W along the Easterly line of that parcel of property described in the said Special Warranty Deed recorded as Reception No. 20130022551 a distance of 9.52 feet:

THENCE, S 07°46'12" E a distance of 20.58 feet;

THENCE, S 82°13'48" W a distance of 175.78 feet to a point on the Westerly line of that parcel of property described in the said Special Warranty Deed recorded as Reception No. 20130022551;

THENCE, N 07°46'12" W along said Westerly line a distance of 20.58 feet;

THENCE, continuing along said Westerly line N00°23'47" E a distance of 9.52 feet;

THENCE, N82° 13'48" E a distance of 175.78 feet, more or less, to the POINT OF BEGINNING

Said described parcel of land contains 5,273 Square Feet or 0.121 Acres, more or less (\pm), and is subject to any rights-of-way or other easements of record or as now existing on said described parcel of land.

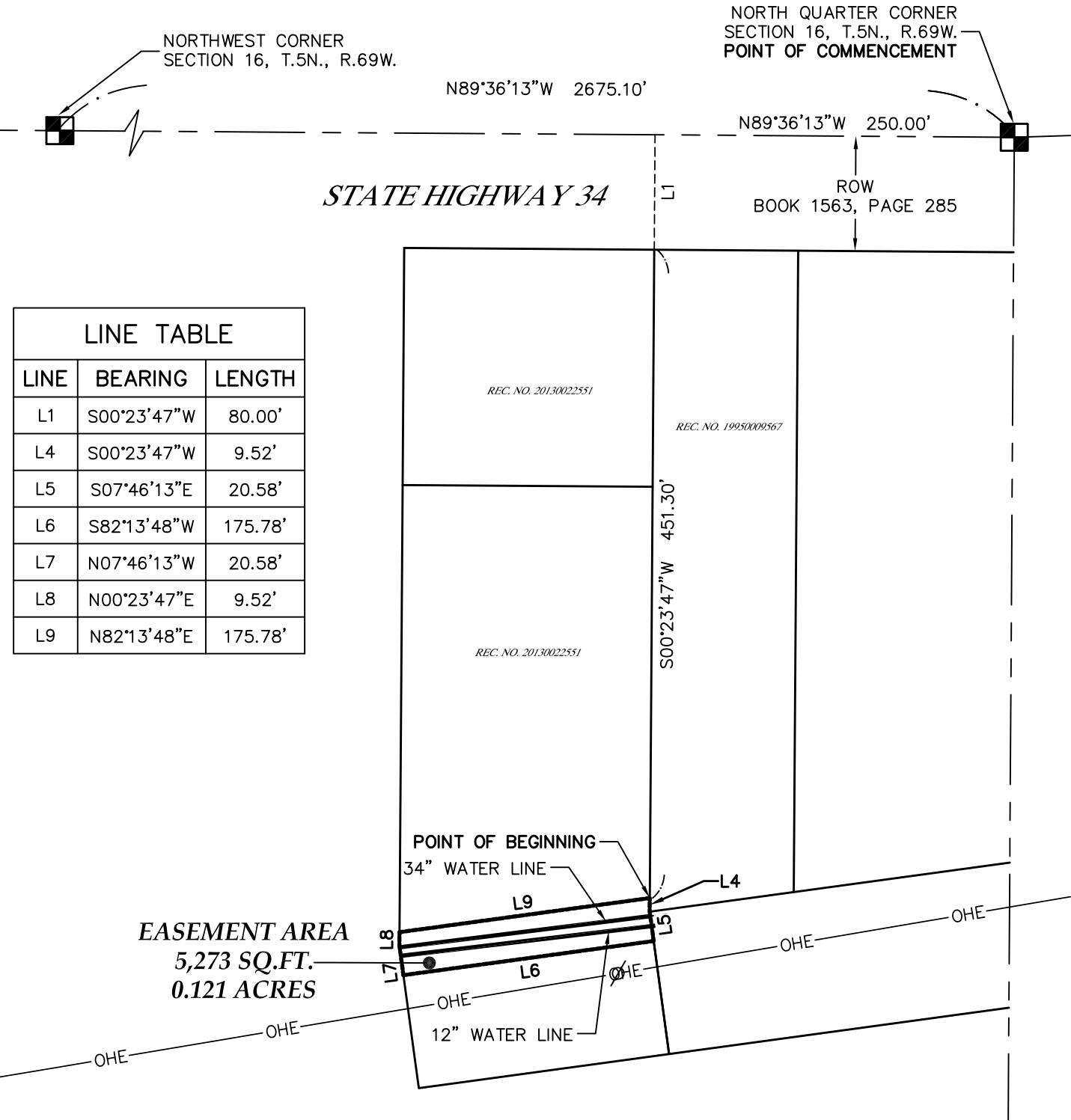
SURVEYORS STATEMENT

I, David B. Dusdal, a Colorado Licensed Professional Land Surveyor do hereby state that this Parcel Description was prepared under my personal supervision and checking and that it is true and correct to the best of my knowledge and belief.

PRELIMINARY

David B. Dusdal - on behalf of King Surveyors
Colorado Registered Professional
Land Surveyor No. 28650

**EXHIBIT
A**



NOTE: This exhibit drawing is not intended to be a monumented land survey. It's sole purpose is as a graphic representation to aid in the visualization of the written property description which it accompanies. The written property description supersedes the exhibit drawing.

NOTICE: According to Colorado law you must commence any legal action based upon any defect in this survey within three years after you first discover such defect. In no event may any action based upon any defect in this survey be commenced more than ten years from the date of the certification shown hereon. (13-80-105 C.R.S. 2012)

PRELIMINARY

David B. Dusdal – On Behalf Of King Surveyors
Colorado Registered Professional
Land Surveyor #28650



KING SURVEYORS
650 E. Garden Drive | Windsor, Colorado 80550
phone: (970) 686-5011 | fax: (970) 686-5821
www.kingsurveyors.com

PROJECT NO: 20160815
DATE: 10/14/2016
CLIENT: CITY OF LOVELAND, WATER & POWER
DWG: 20160815EXH
DRAWN: LEC **CHECKED:** DBD

DISTRICT COURT, COUNTY OF LARIMER,
STATE OF COLORADO
Court Address: 201 LaPorte Avenue
Fort Collins, CO 80521-2761
Phone Number: (970) 494-3500

~~SERVED ONLY: October 27, 2016 10:24 AM
FILING ID: 8AEE5B8B14751
CASE NUMBER: 2016CV30703~~

CITY OF LOVELAND, a Colorado Municipal Corporation,
Plaintiff.

v.

ROGER GOMEZ; JP MORGAN CHASE BANK,
N.A., and FIRST NATIONAL BANK OF OMAHA,
Defendants.

▲ FOR COURT USE ONLY ▲

Attorneys for Defendant City of Loveland, a Municipal Corporation:
Alicia R. Calderón, #32296
Assistant City Attorney
Vincent Junglas, #43697
Assistant City Attorney
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vincent.junglas@cityofloveland.org

Case Number: 16CV 30703

Courtroom: 4A

PLAINTIFF'S INITIAL DISCLOSURES PURSUANT TO C.R.C.P. RULE 26(a)(1)

COMES NOW the City of Loveland, a municipal home rule corporation, by and through undersigned counsel, and pursuant to C.R.C.P. Rule 26 (a)(1) submits the following:

A. INDIVIDUALS LIKELY TO HAVE DISCOVERABLE INFORMATION

The following persons may have knowledge as to the matters which are at issue or have discoverable information relevant to the disputed facts:

1. Melissa Morin
City of Loveland
200 N. Wilson Avenue
Loveland, CO 80537

**EXHIBIT
B**

Ms. Morin is a Civil Engineer for the Water and Power Department of the City of Loveland. She is likely to have discoverable information relating to the water mains located on the property located at 3508 and 3510 West Eisenhower and the policies and procedures of the Water and Power Department. Melissa is likely to have information about the County Review Team process for the lot line change and the proposed concept planning for Defendant's storage business.

2. Gary Graham
City of Loveland
200 N. Wilson Avenue
Loveland, CO 80537

Mr. Graham is the Water Operations Supervisor for the Water and Power Department of the City of Loveland. He is likely to have discoverable information relating to the water mains located on the property located at 3508 and 3510 West Eisenhower, the policies and procedures of the Water and Power Department, and information about the entire water distribution system.

3. Andy TenBraak
City of Loveland
200 N. Wilson Avenue
Loveland, CO 80537

Mr. TenBraak is the Water Metering Supervisor for the Water and Power Department of the City of Loveland. He is likely to have discoverable information relating to the water meters of the property located at 3508 and 3510 West Eisenhower, the policies and procedures of the Water and Power Department, and the repair history for this property.

4. Brieana Reed-Harmel
City of Loveland
200 N. Wilson Avenue
Loveland, CO 80537

Ms. Reed-Harmel is the Senior Electrical Engineer for the Water and Power Department of the City of Loveland. She is likely to have discoverable information relating to the electrical power lines located on the property located at 3508 and 3510 West Eisenhower and the policies and procedures of the Water and Power Department.

5. Craig Weinland
City of Loveland
200 N. Wilson Avenue
Loveland, CO 80537

Mr. Weinland is the Construction Coordinator for the Water and Power Department of the City of Loveland. He is likely to have discoverable information relating to the water line located at 3508 and 3510 West Eisenhower.

6. Mark Miller
City of Loveland
410 East 5th Street
Loveland, CO 80537

Mr. Miller is a former resident of the property at 3508 and 3510 West Eisenhower. He is likely to have discoverable information relating to the water lines located at the property.

7. Carlos Medina
City of Loveland
200 N. Wilson Avenue
Loveland, CO 80537

Mr. Medina is a Civil Engineer for the Water and Power Department of the City of Loveland. He is likely to have discoverable information relating to the water line located at 3508 and 3510 West Eisenhower.

8. Steve Parks
King Surveyors
650 East Garden Drive
Windsor, CO 80550

Mr. Parks is a surveyor for King Surveyors. He is likely to have discoverable information relating to the property at 3508 and 3510 West Eisenhower, and the survey conducted on the property.

9. Kerri Burchett
City of Loveland
410 East 5th Street
Loveland, CO 80537

Ms. Burchett is a Principal Planner for the City of Loveland. She is likely to have discoverable information relating to the water lines located at 3508 and 3510 West Eisenhower, concept review planning for these properties, and the procedures of the Concept Review Team of the City of Loveland.

10. Frank Lindauer
City of Loveland
200 N. Wilson Avenue
Loveland, CO 80537

Mr. Lindauer is an Electrical Engineer for the Water and Power Department of the City of Loveland. He is likely to have discoverable information relating to the power lines located at 3508 and 3510 West Eisenhower.

B. DOCUMENTS AND TANGIBLE THINGS

The following documents are described by their digital file name:

1. “RR Agreement for 12 inch” – Agreement between The Colorado and Southern Railway Co. & City of Loveland for 12 inch water main 5-1-36
2. “RR Agreement for 34 inch” – Agreement between The Colorado and Southern Railway Co. & City of Loveland for 34 inch water main 10-15-54
3. “Quitclaim miller 1980” – Quitclaim Deed between The Colorado and Southern Railway Co. & John & Peggy Miller dated 9/15/71
4. “Assignment – Burlington Northern Railroad 9-21-1989” – Assignment of various leases and permits on Arkins branchline
5. “Unsorted Title Documents”
6. Page 4 of “All Loveland Transmission 11-14-13” – Loveland transmission lines
7. “D22-04” – 115 kV Transmission Line Document
8. “First National Deed of Trust” – Gomez Deed of Trust, First National Bank of Omaha 7-6-16
9. “JP Morgan Deed of Trust” – Gomez Deed of Trust, JP Morgan Chase Bank, N.A. 3-21-13
10. Photos of the property taken by Craig Weinland (11 files)
11. Miscellaneous photos of the property (4 files)
12. “Morin File re 3508 W Eisenhower Blvd” – Documents from Melissa Morin’s file re 3508 W Eisenhower
13. “Ltr Steve A to Gomez” – Letter from Steve Adams to Roger Gomez dated 4-5-16
14. “PZ-15-84-W-1C” – Comments regarding the proposed subdivision and rezoning application
15. “2008 Loveland West area tree trimming” – Platte River Power Authority Work Order for tree trimming

16. “2010 Loveland West area line maint.” – Platte River Power Authority Work Orders for line maintenance
17. “2010 Loveland West area tree trimming” – Platte River Power Authority Work Order for tree trimming
18. “2015 Loveland West area line maint.” – Platte River Power Authority Work Orders for line maintenance
19. “Service Order – Water line 3508 W Eisenhower”
20. “Pipeline” – Map of 12” pipeline
21. “Water Supply” – Map of water supply system
22. “colosouthern000” – Articles of Incorporation of The Colorado & Southern Railroad;
23. 1980 Transmission Facilities Agreement
24. Gomez chain of title
25. “Legal Description and Exhibit Drawing” – Survey prepared by King Surveyors

C.
D. COMPUTATION OF DAMAGES

Not applicable.

E. INSURANCE POLICY

There is no applicable insurance policy.

The City acknowledges its continuing duty to supplement these disclosures pursuant to C.R.C.P. 26(e), and shall do so as additional information becomes available.

Dated this 27th day of October, 2016.

CITY OF LOVELAND
Original signature on file
By: /s/ Alicia R. Calderón
Alicia R. Calderón, #32296
Assistant City Attorney

By: /s/ Vincent Junglas
Vincent Junglas, #43697
Assistant City Attorney

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Vincent.junglas@cityofloveland.org

CERTIFICATE OF SERVICE

The undersigned certifies that the foregoing **Plaintiff's Initial Disclosures Pursuant to C.R.C.P. Rule 26(a)(1)** was served by ICCES e-Service, and a disc containing the documents was delivered as indicated below on this 27th day of October, 2016 to the following:

Via hand delivery to:
Dwight D. Brummet
Dwight D. Brummet, P.C.
325 E. 7th Street
Loveland, CO 80539-0657
Attorney for Defendant Roger Gomez

Via US Mail, postage prepaid to:
First National Bank of Omaha
1620 Dodge Street
Omaha, NE 68197

JP Morgan Chase Bank, N.A.
c/o The Corporation Company
1675 Broadway, Suite 1200
Denver, CO 80202

/s/ Kayla Demmler
Original signature on file