

DISTRICT COURT, GRAND COUNTY, COLORADO  307 Moffat Ave. Hot Sulphur Springs, CO 80451 (970) 725-3357	
GRANBY RANCH METROPOLITAN DISTRICT, a quasi-municipal corporation and political subdivision of the State of Colorado,  Plaintiff,  v.  HEADWATERS METROPOLITAN DISTRICT, a quasi-municipal corporation and political subdivision of the State of Colorado; and GP GRANBY HOLDINGS, LLC,  Defendants.	<p style="text-align: center;"><b>▲ COURT USE ONLY ▲</b></p> Case Number: 2021CV30008 Div.:                      Ctrm:
<i>Attorneys for Defendant Headwaters Metro. District:</i> Marni Nathan Kloster, Reg. No. 34947 J. Andrew Nathan, Reg. No. 3295 NATHAN DUMM & MAYER P.C. 7900 E. Union Avenue, Suite 600 Denver, CO 80237-2776 Phone Number: (303) 691-3737 Email: <i>MNathan@ndm-law.com; ANathan@ndm-law.com</i>	
<b>DEFENDANT HEADWATERS METROPOLITAN DISTRICT’S MOTION TO DISMISS PURSUANT TO C.R.C.P. 12(B)(1) &amp; (5)</b>	

Defendant, Headwaters Metropolitan District (“Headwaters”), by and through its attorneys at Nathan Dumm & Mayer, P.C., hereby submits its Motion to Dismiss pursuant to C.R.C.P. 12(b)(1) & (5), and in support thereof states as follows:

**CERTIFICATION PURSUANT TO C.R.C.P. 121 § 1-15(8)**

The undersigned counsel has conferred with Plaintiff’s counsel in detail in an attempt to narrow and/or eliminate claims and, thus, limit the issues before the Court. Plaintiff’s response to that conferral was to object and decline further action, thereby necessitating this Motion.

## **INTRODUCTION**

Plaintiff seeks to enforce a Lease Purchase Agreement (“LPA”) to which it is neither a signatory nor third-party beneficiary. The LPA was executed by Headwaters, which is also a special district, and Granby Realty Holdings LLC (“GRH”), and entity that forfeited its property to the co-defendant GP Granby Holdings, LLC (“GPGH”). The purpose of the LPA was to lease a parcel of land in Grand County containing a ski area and golf course. The subordination clause of the LPA contained certain prerequisites, including that the subordination be requested, the lender tender a non-disturbance agreement to Headwaters, and the non-disturbance agreement contain certain provisions.

All in all, Plaintiff cannot enforce this subordination clause through its claims of breach of contract and breach of the covenant of good faith and fair dealing against Headwaters. Plaintiff has no standing to bring either of these claims because it is neither a party nor third-party beneficiary to the LPA. Moreover, Plaintiff has failed to allege cognizable claims because no contractual obligations were triggered and there was no bad faith and unfair dealing on the part of Headwaters. Thus, Headwaters moves for dismissal of the claims against it pursuant to C.R.C.P. 12(b)(1) and (5).

## **STANDARD OF REVIEW**

Headwaters submits this Motion pursuant to C.R.C.P. 12(b)(1) and (5). Under C.R.C.P. 12(b)(1), a claim may be dismissed for the Court’s lack of subject matter jurisdiction. It is the plaintiff’s burden to prove subject matter jurisdiction. *Medina v. State*, 35 P.3d 443, 452 (Colo. 2001) (citing *Trinity Broadcasting, Inc. v. City of Westminster*, 848 P.2d 916, 925 (Colo. 1993)). The Court may make any necessary factual findings to determine whether it has subject matter

jurisdiction, and the Court is not required to treat the plaintiff's allegations as true for purposes of this determination. *Medina*, 35 P.3d at 452.

An assertion that the plaintiff lacks standing to raise a claim is an argument that the Court lacks subject matter jurisdiction under C.R.C.P. 12(b)(1). *Tabor Found. v. Colo. Dep't of Health Care Policy & Fin.*, 2020 COA 156, ¶ fn.3. This is so because “[s]tanding is a component of subject matter jurisdiction and is a constitutional prerequisite to maintaining a lawsuit.” *Hansen v. Barron's Oilfield Serv.*, 2018 COA 132, ¶ 7 (quoting *Sandstrom v. Solen*, 2016 COA 29, ¶ 14).

Under C.R.C.P. 12(b)(5), a claim is subject to dismissal if it “fail[s] to state a claim upon which relief can be granted.” A court properly dismisses a claim or complaint for failure to state a claim for relief when it does not state “a plausible claim for relief,” and asserts legal theories without alleging facts that if proven would entitle the plaintiff to relief. *Warne v. Hall*, 373 P.3d 588, 591 (Colo. 2016) (citing *Ashcroft v. Iqbal*, 556 U.S. 662, 679 (2009)); see also *Denver Post Corp. v. Ritter*, 255 P.3d 1083, 1088 (Colo. 2011). Courts reviewing these motions “are not required to accept as true legal conclusions that are couched as factual allegations.” *Denver Post*, 255 P.3d at 1088 (citation omitted). Legal conclusions about a party's actions “without alleging the reasons why and the manner in which the conditions [met those conclusions], could only be considered formulaic or conclusory and therefore not entitled to be assumed true.” *Warne*, 373 P.3d at 596. The court may also review a document to which the complaint refers without converting the 12(b)(5) motion into a motion for summary judgment. *Yadon v. Lowry*, 126 P.3d 332, 336 (Colo. App. 2005).

## STATEMENT OF FACTS<sup>1</sup>

1. Plaintiff is a special district which encompasses certain properties within its boundaries. [Compl., ¶ 5].
2. Headwaters is also a special district which governs properties within its boundaries. [*Id.*].
3. Headwaters leased from GRH a parcel of land in Grand County that includes a ski area and golf course (“Leased Premises”). [Compl., Ex. 1, ¶ 1.a.].
4. “In 2005, GRH granted [Redwood Capital Finance Company, LLC (‘Redwood’)] a deed of trust on the Leased Premises to secure repayment of certain debts.” [Compl., ¶ 10].
5. “On December 31, 2012, GRH and Headwaters entered into the Second Amended and Restated Lease Purchase Agreement (‘LPA’),” which Plaintiff submitted as Exhibit 1 to its Complaint. [*Id.* at ¶ 7].
6. The LPA refers to GRH as the “Landlord” and Headwaters as the “Tenant.” [Compl., Ex. 1, p. 1].
7. The purpose of the LPA was to give Headwaters the right to use and an option to acquire the Leased Premises and to set forth certain responsibilities between Headwaters and GRH. [*Id.*].
8. The LPA referred to the ski area and golf course as the “Amenities.” [*Id.*, Recitals, ¶ C].
9. Under the LPA, the Landlord leased the Amenities to the Tenant for a term of fifty (50) years and gave Tenant the option to acquire the Leases Premises during the term or upon at the expiration of the term upon payment of the purchase price specified therein. [*Id.*, Compl. Ex. 1, ¶ ¶ 2, 23].

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<sup>1</sup> For purposes of the Court’s review under C.R.C.P. 12(b)(5), Headwaters treats Plaintiff’s allegations in the light most favorable to it, although such is not required under C.R.C.P. 12(b)(1). Headwaters does not waive any right to dispute any or all of these allegations presented in this section.

10. The rent paid under the LPA was limited to certain “Amenity Fees” collected by Headwaters and remitted to the Landlord. There was no set amount of rental; the parties to the LPA agreed that “the amount of Amenity Fees received by the Tenant may fluctuate greatly from month to month and year to year.” [*Id.* Compl. Ex. 1, ¶ 3].
11. In addition, the LPA contemplated that Tenant’s governing body might – at any time during the term – decline to approve the payment of any funds to the Landlord under the LPA, resulting in termination of the Lease. [*Id.* Compl. Ex. 1, ¶¶ 2 (a), 3 (c)].
12. The Landlord also had the right to terminate the LPA based upon any default by Tenant. [*Id.* Compl. Ex. 1, ¶ 2(b)].
13. The LPA did not allow any refund of rental paid upon termination of the LPA, instead stating that rent was not subject to “recoupment for any reason whatsoever.” [*Id.* Compl. Ex. 1, ¶ 3(a)].
14. Under the LPA, the Landlord remained responsible for all utilities, taxes, insurance, and maintenance costs relating to the Amenities. [*Id.* Compl. Ex. 1, ¶ 3 (b); 6 (a)].
15. By its plain language, Plaintiff was neither a signatory nor identified party to the LPA. [Comp, Ex. 1].
16. The LPA’s only reference to Plaintiff was the following:

In order to pay rental payments with respect to the Leased Premises and pay the purchase price of the Leased Premises, Tenant has previously adopted, with the Granby Ranch Metropolitan District, a Joint Resolution to Establish an Amenity Fee dated May 26, 2005, as amended September 6, 2006 (as amended from time to time, the “Fee Resolution”), and has entered into that certain Amenity Fee Agreement with Granby Realty Holdings LLC dated as of June 1, 2005, and that certain Aspen Meadows Amenity Fee Agreement with Aspen Meadows Condominiums, LLC dated as of July 5, 2005 (collectively, the “Fee Agreements”), pursuant to which resolution and agreements the Tenant imposes Amenity Fees (as further described herein) on property within the

Granby Ranch development (“Granby Ranch”) for use of the Leased Premises, as more particularly described therein.

[*Id.*, Recitals, ¶ B].

17. The LPA contained a subordination clause that reads as follows:

**Upon the request of Landlord**, Tenant shall subordinate the lien of this Lease to the lien of any mortgage or deed of trust encumbering the Leased Premises, so long as such lender provides Tenant a Non-Disturbance Agreement in form and substance reasonably acceptable to Tenant and which shall provide, among other things, that upon such lender’s succession of interest it shall be bound as Landlord to the provisions of this Lease, including the Tenant’s right to acquire the Leased Premises in accordance with Section 23 hereof. Such instrument will be completed by Tenant and delivered to Landlord within 10 days of the date requested.

[*Id.* at ¶ 26](emphasis added).

18. The LPA also contained a merger/integration provision which states:

**This instrument shall merge all undertakings, representations, understandings, and agreements whether oral or written, between the Parties with respect to the Leased Premises and the provisions of this Lease and shall constitute the entire Lease unless otherwise hereafter modified by both Parties in writing.**

[*Id.* at ¶ 28(e)](emphasis added).

19. Paragraph 28(f) of the LPA provides:

**This instrument shall also bind and benefit, as the case may require, the heirs, legal representatives, assigns and successors of the respective Parties, . . .** This instrument shall not become binding upon the Parties until it shall have been executed and delivered by both Landlord and Tenant.

[*Id.* at ¶ 28(f)](emphasis added).

20. On or before May 28, 2020, GRH defaulted on the deed of trust. [Compl., ¶ 11].

21. Because of GRH’s default, GPGH foreclosed on the Leased Premises between May 28 and August 31, 2020. [*Id.*].

22. In September of 2020, GPGH notified Headwaters and all residents of the community of its position that the LPA had been terminated by the foreclosure. [*Id.* at 13].
23. Plaintiff asserts that the foreclosure did not terminate the LPA and that GPGH is the successor-in-interest to the LPA and “Landlord” for purposes of the LPA’s subordination clause. [*Id.* at ¶ 14]. That assertion is not based upon any alleged deficiency in the foreclosure process, but on Plaintiff’s legal conclusion. [*Id.* at ¶ 46].
24. The LPA set forth certain grounds for termination. [*See, e.g.* Compl, Ex. 1, ¶10].
25. “[O]n November 11, 2020, GPGH notified Headwaters that even assuming the LPA was not terminated by way of foreclosure that it has ceased to operate the Amenities for in excess of 30 days, and thus, pursuant to Section 10 of the LPA, it was electing to terminate the LPA.” [*Id.* at ¶ 16].
26. Plaintiff asserts two claims against Headwaters: (i) breach of ¶ 26 of the LPA and (ii) breach of the implied duty of good faith and fair dealing under ¶ 26 the LPA. [Compl. ¶¶ 28-31, 38-44]. The claims solely seek monetary damages. [Compl., ¶¶ 31, 44].

## **LEGAL ARGUMENT**

### **1. Plaintiff lacks standing to assert its claims against Headwaters because it is not a party to or third-party beneficiary to the LPA.**

Plaintiff’s lack of standing bars it from bringing suit to enforce the LPA. Colorado law requires a plaintiff to have standing in order for the court to have jurisdiction over the claims asserted. *Ainscough v. Owens*, 90 P.3d 851, 855 (Colo. 2004). Standing requires an injury-in-fact and a legally protected interest. *Weisfield v. City of Arvada*, 2015 COA 43, ¶ 8 (citing *Hickenlooper v. Freedom from Religion Found., Inc.*, 2014 CO 77, ¶ 8). “[A]n injury that is overly ‘indirect and incidental’ in relation to the defendant’s conduct will not convey standing.”

*Weisfield*, 2015 COA 43, ¶ 10 (quoting *Hickenlooper*, 2014 CO 77, ¶ 9) (citing *Ainscough*, 90 P.3d at 856). It is the plaintiff's burden to establish an injury-in-fact and legally protected interest. *Id.* at ¶ 8.

The interpretation of a contract is a question of law. *Draper v. DeFrenchi-Gordineer*, 282 P.3d 489, 493-94 (Colo. App. 2011) (citing *Ad Two, Inc. v. City & County of Denver*, 9 P.3d 373, 376 (Colo. 2000)). Generally, under Colorado law only a party to a contract has standing to enforce the terms of the contract. *Bewley v. Semler*, 2018 CO 79, ¶ 16. Third-party beneficiaries, however, are an exception to this general rule. *Id.* at ¶ 17. They also may bring suit to enforce the terms of the contract to which they are third-party beneficiaries. *Id.* The third-party beneficiaries' right to sue extends only to the extent that the parties to the contract intended to benefit the third party and the third party receives a direct benefit. *Id.* There must be an "apparent" intent to benefit the third party. *Quigley v. Jobe*, 851 P.2d 236, 238 (Colo. App. 1992).

The third party, however, may not sue unless the intended benefit is direct, not merely incidental. *Id.* "[A]n incidental beneficiary is one who is neither a promisee nor one to whom the promise is to be rendered but who is benefitted by the undertakings of the contracting parties." *Id.* (citing *Fourth & Main Co. v. Joslin Dry Goods Co.*, 648 P.2d 178 (Colo. App. 1982)). As such, a third party must establish that the parties to the contract intend "to confer a benefit on the third party when contracting." *Everett v. Dickinson & Co. Inc.*, 929 P.2d 10, 12 (Colo. App. 1996); *Harwig v. Downey*, 56 P.3d 1220, 1221 (Colo. App. 2002).

Here, Plaintiff rightly does not attempt to allege that it is an actual party to the agreement. Rather, it only alleges it has standing as a purported third-party beneficiary to the LPA. Because

this is an issue of standing, the Court must make factual findings on jurisdiction and not just rely on Plaintiff's assertions.

Turning to the LPA, its express purpose was to lease the Amenities to Headwaters. The LPA did not expressly or otherwise confer any direct benefit onto the non-signatory Plaintiff. Had the parties intended for the Plaintiff to be a party or third party beneficiary they could have drafted such, but they did not. Plaintiff's allegation in the Complaint that it is a third-party beneficiary because it can collect amenity fees for the Leased Premises through the Fee Resolution is belied by the plain language of the LPA. [*Compl.*, ¶¶ 8-9].

To explain, first, the Fee Resolution is wholly separate from the LPA and by the plain language of the Plaintiff's Complaint is not actually the basis for the two claims alleged against Headwaters, which are premised solely on provision 26 of the LPA. [*Compl.*, ¶¶ 29 & 42]. In provision 26 of the LPA, Plaintiff was never mentioned nor was the Fee Resolution discussed. Instead, provision 26 of the LPA involves an entirely separate matter. As such, that paragraph does not confer any benefits on Plaintiff. Because the claims against Headwaters are premised solely on provision 26 of the LPA and that provision by its own plain language in no way confers or indicates a benefit to a third party, Plaintiff's claims automatically fail for a lack of standing.

Second, even if the Court expanded its review, the LPA mentions the Fee Resolution in the context of Headwaters' ability to pay rental fees it owes to GRH and exercising its option to purchase the Leased Premises. [*Id.*, Ex. 1, Recitals, ¶ B, ¶ 3(c), ¶ 23(b)(ii)]. The LPA refers to the Fee Resolution as a "Joint Resolution to Establish an Amenity Fee." [*Id.*, Ex. 1, Recitals, ¶ B]. The title does not refer to the collection of amenity fees, and this recital in the LPA does not reference Plaintiff's role in the collection of amenity fees or that the LPA was otherwise intended

to benefit Plaintiff. [*Id.*]. Instead, in this recital and in other provisions, the LPA clearly provides that it is Headwaters that collects the amenity fees. [*Id.* at Recitals, ¶ B, ¶ 3(c), ¶ 23(b)(ii)]. Further, the LPA makes clear that the fees collected are to be paid to the Landlord and confers no right to Headwaters, let alone Plaintiff, to those fees. [*Id.* at ¶ 3(a)]. In fact, the LPA makes clear in provision 3(a) that any amenity fees paid under the LPA are “absolute and unconditional” and not subject to “set-off, defense, counterclaim or recoupment for any reason whatsoever.” [*Id.*]. Thus, there was no intention in the LPA, let alone a clear intention, that the parties intended to benefit Plaintiff by allowing Headwaters to collect amenity fees to be used for payments due to the Landlord for the Leased Premises.

Third, provision 28(e) of the LPA makes clear that the LPA was the final and “entire” statement of the parties on the issues covered therein and, thus, directly bars any attempt by Plaintiff’s to incorporate the Fee Resolution. That provision also allows the Tenant and Landlord to modify the LPA at any time in writing – without the need for consultation or interjection by Plaintiff or any other party. No party other than Landlord or Tenant also had any right to notices under the LPA, including notices of default or termination. [*Id.* at ¶ 20.] And provision 28(f) conclusively states that the LPA shall bind “and benefit” only the parties thereto and their successors. These provisions highlight that there was no intent by the parties to the LPA to confer a benefit on Plaintiff, as required for third party beneficiary status.

In sum, under the LPA, the Landlord granted rights with respect to the Leases Premises to Headwaters alone, and those rights were not subject to control or interference by Plaintiff. While the LPA included the option for Headwaters to pay the specified purchase price and acquire the Amenities during 50-year term of the lease, Headwaters had sole discretion to

determine whether or not to exercise that option. Upon the occurrence of any termination as provided in the LPA, Headwaters had no right to refund of any rental payments made under the LPA. If Headwaters had no right to claim a loss of “equity” under the LPA, then Plaintiff – which had no right to acquire the Amenities under the LPA – certainly cannot.

Because Plaintiff lacks standing to enforce the LPA, its claims for breach of contract and breach of the implied covenant of good faith and fair dealing must be dismissed for lack of subject matter jurisdiction under C.R.C.P. 12(b)(1).

**2. Plaintiff’s breach of contract claim must also be dismissed because it fails to allege as a matter of law that Headwaters breached the LPA’s subordination clause.**

In addition to not having standing to assert a claim for breach of contract, the claim as pled by Plaintiff fails to plead all elements required. Under Colorado law, a plaintiff asserting breach of contract must allege the following elements: “(1) the existence of a contract; (2) performance by the plaintiff or some justification for nonperformance, (3) failure to perform the contract by the defendant; and (4) resulting damages to the plaintiff.” *Horton v. Bischof & Coffman Constr., LLC*, 217 P.3d 1262, 1271 (Colo. App. 2009) (citing *W. Distrib. Co. v. Diodosio*, 841 P.2d 1053, 1058 (Colo. 1992)). As stated in the previous section, the interpretation of a contract is a question of law. *Draper*, 282 P.3d at 493-94 (citing *Ad Two, Inc.*, 9 P.3d at 376).

Here, Plaintiff has failed to plead a cognizable breach of the LPA’s subordination clause by Headwaters. Plaintiff alleges that Headwaters breached provision 26 of the LPA by not obtaining or requesting a non-disturbance agreement from Co-defendant GPGH. [Compl., ¶¶ 29-30]. Plaintiff’s claim fails for the initial reason that the LPA was terminated by the foreclosure before conveyed to GPGH, and therefore Headwaters had no contractual relationship with

GPGH and could not have breached any obligation under the LPA with respect to its actions or omission toward GPGH.

Moreover, on its fact, the subordination clause, which is provision 26 of the LPA, however, contains three express conditions precedent:

**(1) Upon the request of Landlord**, Tenant shall subordinate the lien of this Lease to the lien of any mortgage or deed of trust encumbering the Leased Premises, **(2) so long as such lender provides Tenant a Non-Disturbance Agreement** **(3) in form and substance reasonably acceptable to Tenant and** which shall provide, among other things, **that upon such lender's succession of interest it shall be bound as Landlord** to the provisions of this Lease, including the Tenant's right to acquire the Leased Premises in accordance with Section 23 hereof. Such instrument will be completed by Tenant and delivered to Landlord within 10 days of the date requested.

[*Id.*, Ex. 1, ¶ 26 (emphasis and numbering added)].

Plaintiff has failed to plead facts establishing the occurrence of any of these three conditions. A failure to plead or lack of evidence for any one of these three conditions, let alone all of them, is grounds for dismissal of both claims against Headwaters.

To explain in more detail, first, Headwaters' action is conditional “[u]pon the request of Landlord . . . .” [*Id.*]. Headwaters is the Tenant, not the Landlord, in the LPA. In its Complaint, Plaintiff did not plead that the landlord made such a request to Headwaters, and its allegation that Tenant Headwaters did not make the request for the non-disturbance agreement is a misstatement of Headwaters' contractual duties under this subordination clause. [*See* Compl., ¶ 29]. Further, Plaintiff has pled that co-defendant GPGH became the landlord for purposes of this subordination clause and, in its first claim against GPGH, alleged that GPGH failed to fulfill its contractual duties under provision 26 of the LPA, which is completely inconsistent with the assertions against Headwaters. [*Id.* at ¶¶ 24-25]. Plaintiff cannot have it both ways. And Plaintiff does not allege that GPGH, as Landlord, requested subordination from Headwaters.

Nonetheless, in short, absent pleading and proof as to condition one, Headwaters had no duty as a matter of law to act under the subordination clause.

The second express condition precedent in the subordination clause is the provision associated with a non-disturbance agreement: “so long as such lender provides Tenant a Non-Disturbance Agreement.” [Compl., Ex. 1, ¶ 26]. Plaintiff did not plead or establish compliance with this provision either. Instead, Plaintiff pled that co-defendant GPGH, whom Plaintiff appears to allege is the lender for purposes of this clause, did not tender a non-disturbance agreement to Headwaters. [Compl., ¶¶ 25, 29]. Without establishing this condition has been met, which Plaintiff has failed to do, Headwaters’ contractual duties were not triggered.

The third express condition precedent has to do with the specific terms of the non-disturbance agreement. The subordination clause required that the agreement be “in form and substance reasonably acceptable to Tenant [*i.e.*, Headwaters]” and that it contained the provision that “upon such lender’s succession of interest it shall be bound as Landlord . . . .” [Compl., Ex. 1, ¶ 26]. As stated in the previous paragraph, Plaintiff expressly pled that Headwaters did not have the non-disturbance agreement, thereby stating there was a lack of this condition having been met as well. [Compl., ¶¶ 25, 29].

Because Plaintiff failed to allege satisfaction with any, let alone all, of these three required conditions precedent and cannot prove each, there can be no breach of the subordination clause on the part of Headwaters. The Court, therefore, must dismiss the breach of contract claim under C.R.C.P. 12(b)(5).

**3. Plaintiff's breach of the covenant of good faith and fair dealing claim must also be dismissed because it fails to allege a cognizable breach.**

Plaintiff's breach of the covenant of good faith and fair dealing claim appears to be premised on breach of the subordination clause and civil conspiracy. Regardless of the premise, as with the breach of contract claim, this claim fails not only on standing, but also because of the termination of the LPA and failure to plead all elements of the claim. Under Colorado law, "the implied covenant of good faith and fair dealing is used to effectuate the intention of the parties or to honor their reasonable expectations in entering into the contract." *Bayou Land Co. v. Talley*, 924 P.2d 136, 154 (Colo. 1996) (citations omitted); *ADT Sec. Servs. v. Premier Home Prot., Inc.*, 181 P.3d 288, 293 (Colo. App. 2007). A breach of the implied covenant of good faith and fair dealing occurs "when a party uses discretion conferred by the contract to act dishonestly or to act outside of accepted commercial practices to deprive the other party of the benefit of the contract." *Id.* (citing *Wells Fargo Realty Advisors Funding, Inc. v. Uioli, Inc.*, 872 P.2d 1359, 1363 (Colo. App. 1994)).

"The elements of civil conspiracy are that: (1) two or more persons; (2) come to a meeting of the minds; (3) on an object to be accomplished or a course of action to be followed; (4) and one or more overt unlawful acts are performed; (5) with damages as the proximate result thereof." *Fire Ins. Exch. v. Bentley*, 953 P.2d 1297, 1303 (Colo. App. 1998) (citing *Jet Courier Serv., Inc. v. Mulei*, 771 P.2d 486 (Colo. 1989)). Civil conspiracy requires two or more conspirators. *Fire Ins. Exch.*, 953 P.2d at 1303. Because civil conspiracy is a derivative action, the predicate act must be itself unlawful and an independent cause of action. *Falcon Broadband, Inc. v. Banning Lewis Ranch Metro. Dist. No. 1*, 2018 COA 92, ¶ 55 (citing *Double Oak Constr., L.L.C. v. Cornerstone Dev. Int'l, L.L.C.*, 97 P.3d 140, 146 (Colo. App. 2003)). Further, under the

economic loss rule, a party who sustains only economic damages from the breach of a contract cannot assert a claim for civil conspiracy. *Logixx Automation v. Lawrence Michels Family Trust*, 56 P.3d 1224, 1231 (Colo. App. 2002).

In *Logixx Automation*, the Court of Appeals examined whether signatories to a contract can conspire to breach a contract. *Id.* The Court found that “a contracting party has no independent duty not to conspire to breach its own contract with another signatory to that contract.” *Id.* Consequently, the Court held “that there can be no conspiracy by two or more parties to a contract to breach that contract.” *Id.*

Here, Plaintiff has failed to plead the required elements for bad faith and unfair dealing. Plaintiff attempts to propose two bases for bad faith and unfair dealing: breach of the subordination clause and civil conspiracy. [Compl., ¶¶ 42-43]. As discussed in the previous section, Plaintiff has failed to allege and/or prove a cognizable breach of the subordination clause. Moreover, even if provision 26 of the LPA conferred discretion on Headwaters, Plaintiff failed to plead facts sufficient to trigger that provision in the first instance. *See Uioli*, 872 P.2d at 1363. Thus, Headwaters cannot have committed the requisite bad faith and unfair dealing on this basis.

Plaintiff’s civil conspiracy basis for the claim is also legally deficient. As an initial matter, a civil conspiracy requires two or more conspirators and Plaintiff has failed to plead with whom Headwaters conspired. [*See id.* at ¶ 43]. That alone provides grounds for dismissal. Moreover, if Plaintiff is intending to allege Headwaters conspired with Co-defendant GPGH, [*see id.* at ¶¶ 16, 35], then Plaintiff’s claim is barred because of its allegations that GPGH and Headwaters are parties to the LPA, [*Id.* at ¶ 11]. Plaintiff cannot base its claim on an alleged

conspiracy between two contracting parties under *Logixx Automation*, 56 P.3d at 1231. Further, Headwaters has no duty under tort to Plaintiff. Thus, Plaintiff's claim lacks the requisite predicate needed for a conspiracy. One cannot conspire to act lawfully.

Further, Plaintiff should not be able to argue that conspiracy is the underlying bad faith and unfair conduct because Plaintiff is, in essence, trying to plead its way around the economic loss rule. This rule is designed to prevent a party from recouping damages in tort when it has sustained only contract damages. *Logixx Automation*, 56 P.3d at 1231. It is a violation of the spirit of the economic loss rule, if not the letter of the rule, to allow this to occur through the vehicle of breach of the implied covenant of good faith and fair dealing.

For these reasons, the Court must dismiss Plaintiff's claim of breach of the implied covenant of good faith and fair dealing asserted against Headwaters under C.R.C.P. 12(b)(5).

### **CONCLUSION**

Plaintiff's breach of contract and breach of the implied covenant of good faith and fair dealing claims against Headwaters are legally deficient and no valid amendments will correct these deficiencies. First, both of these claims fail as a matter of law because Plaintiff has no standing to bring them as it is neither a party to the LPA nor a third-party beneficiary of it. Second, The LPA was terminated. Third, Plaintiff's breach of contract claim fails because Headwaters did not breach the subordination clause nor has such been properly pled and established. Fourth and finally, Plaintiff's breach of the implied covenant of good faith and fair dealing claim fails because of the absence of a contractual breach and the fact that civil conspiracy cannot constitute bad faith and unfair dealing in these circumstances. The Court,

therefore, must dismiss Plaintiff's claims against Headwaters, with prejudice, under C.R.C.P. 12(b)(1) and (5).

**WHEREFORE**, Defendant Headwaters Metropolitan District respectfully requests that this Court dismiss Plaintiff Granby Ranch Metropolitan District's claims of breach of contract and breach of the covenant of good faith and fair dealing against Defendant Headwaters Metropolitan District with prejudice, and award any such other and further relief as the Court deems appropriate, including its costs and reasonable attorney fees.

Dated this 21<sup>st</sup> day of April, 2021.

Respectfully submitted,

NATHAN DUMM & MAYER P.C.

*s/Marni Nathan Kloster*

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Marni Nathan Kloster, #34947

J. Andrew Nathan, #3295

Attorneys for Defendant Headwaters Metro. District

**CERTIFICATE OF SERVICE**

I hereby certify that on this 21<sup>st</sup> day of April, 2021, a true and correct copy of the foregoing **DEFENDANT HEADWATERS METROPOLITAN DISTRICT'S MOTION TO DISMISS PURSUANT TO C.R.C.P. 12(B)(1) & (5)** was served via the State of Colorado's e-filing system upon each of the following:.

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