DISTRICT COURT, GRAND COUNTY, COLORADO Court Address: Grand County Combined Courts 307 Moffat Ave Hot Sulphur Springs, CO 80451 Telephone No.: (970) 725-3357	DATE FILED: May 21, 2021 9:03 PM FILING ID: 66C46147635C1 CASE NUMBER: 2021CV30008
Plaintiff: GRANBY RANCH METROPOLITAN DISTRICT, a quasi-municipal corporation and political subdivision of the State of Colorado, **v.** **Defendants:** HEADWATERS METROPOLITAN DISTRICT, a quasi-municipal corporation and political subdivision of the State of Colorado; and GP GRANBY HOLDINGS, LLC.	⮝**COURT USE ONLY**⮝ Case No.: 2021CV030008 Div.: Rm.:
Counsel for Plaintiff: Charles E. Norton, #10633 Alicia M. Garcia, #53860 NORTON & SMITH, P.C. 1331 17th Street, Suite 500 Denver, Colorado 80202 Phone Number: (303) 292-6400 FAX Number: (303) 292-6401 E-mail: CNorton@NortonSmithLaw.com AGarcia@NortonSmithLaw.com	

PLAINTIFF'S RESPONSE IN OPPOSITION TO DEFENDANT, GP GRANBY HOLDINGS, MOTION TO DISMISS

Plaintiff Granby Ranch Metropolitan District ("GRMD") through its undersigned counsel, submits this Response in Opposition to Defendant, GP Granby Holdings' ("GPGH"), Motion to Dismiss.

PROCEDURAL POSTURE OF THE CASE

Plaintiff GRMD commenced this action on February 23, 2021 by filing a complaint against two defendants, Headwaters and GP Granby Holdings, LLC ("GPGH"). Both Headwaters and GPGH have filed motions to dismiss which overlap substantially but do have some arguments that

are unique to each motion. Both motions are substantially dependent on the argument that Plaintiff is neither a party nor a third-party beneficiary to the "Lease Purchase Agreement" ("LPA") that is the basis of GRMD's claims.

On Thursday, May 20, 2021 GRMD exercised its right under C.R.C.P. 15(a) to file an amended complaint before any responsive pleading has been filed. However, Plaintiff does not contend that this action in and of itself moots the entirety of the two motions to dismiss. Instead, the complaint has been amended to include additional facts based upon documents that have recently been assembled by GRMD which it believes bolster its claims and make it even clearer that the two motions to dismiss should be denied.

RESPONSE TO STATEMENT OF FACTS

GRMD has presented an extensive factual recitation in response to Headwater's Statement of Facts in its Response to Headwater's Motion to Dismiss. Given the substantial overlap of the two motions, GRMD incorporates that Response to Statement of Facts into this Response and any references thereto shall be by paragraph number in the Statement as set forth in the Response to Headwater's Motion to Dismiss.

STANDARD OF REVIEW

A C.R.C.P. 12(b)(1) motion addresses "the court's authority to deal with the class of cases in which it renders judgment." *Paine, Webber, Jackson & Curtis v. Adams*, 718 P.2d 508, 513 (Colo. 1986), *quoting In re Marriage of Stroud*, 631 P.2d 168, 170 (Colo. 1981). Whether a court possesses such jurisdiction is generally only dependent on the nature of the claim and the relief sought. *Trans Shuttle, Inc. v. Public Utilities Commission of the State*, 58 P.3d 47, 50 (Colo. 2002). Jurisdiction exists if the "case is one of the type of cases which the court has been empowered to

entertain by the sovereign from which the court derives its authority." *Paine, Webber, Jackson & Curtis*, 718 P.2d at 513.

C.R.C.P. 12(b)(5) motions to dismiss are generally disfavored and are construed "in the light most favorable to the plaintiff". *N.M. v. Trujilo*,397 P.3d 370, 373 (Colo. 2017); *Denver Post Corp. v. Ritter*, 255 P.3d 1083, 1088 (Colo. 2011). A C.R.C.P. 12(b)(5) motion to dismiss tests the formal sufficiency of a plaintiff's complaint to ensure that it "states a plausible claim for relief". *Warne v. Hall*, 373 P. 3d 588 (Colo. 2016) (quoting *Ashcroft v. Iqbal*, 556 U.S. 662, 679 (2009). In a 12(b)(5) motion to dismiss, the critical question is "assum[ing] the truth of all well-pleaded facts . . . and draw[ing] all reasonable inferences therefrom in the light most favorable to the plaintiff", whether the complaint "raise[s] a right to relief above the speculative level." *Dias v. City and County of Denver*, 567 F.3d 1169, 1178 (10th Cir. 2009) (quoting *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 555, (2007)); *Total Renal Care, Inc. v. Western Nephrology & Metabolic Bone Disease, P.C.*, 2009 WL 25966493, *2 (D. Colo. Aug. 21, 2009) (quoting *Iqbal*, 556 U.S. at 677) (finding that in its complaint, a plaintiff is merely required to allege something "more than an unadorned, the defendant-unlawfully-harmed-me accusation."). A court may dismiss a complaint for failure to state a claim only "where the factual allegations in the complaint cannot, as a matter of law, support the claim for relief." *Bewley v. Semler*, 432 P.3d 582 (Colo. 2018), citing *Colorado Ethics Watch v. Senate Majority Fund, LLC*, 269 P.3d 1248 (Colo. 2012).

ARGUMENT

I. The C.R.C.P. 12(b)(1) Motion to Dismiss Should be Denied Because GRMD has Standing to Bring This Suit as a Third-Party Beneficiary to the LPA.

In its motion to dismiss, GPGH contends that GRMD is not a third-party beneficiary to the LPA because there is no direct benefit to GPGH under the LPA. As a basis for this claim, GPGH

states that none of the sections cited in GRMD's complaint convey a direct benefit to it. And because GRMD was not made a party to the LPA and/or no provision expressly named GRMD as an intended beneficiary, GPGH contends that as a matter of law GRMD was not intended as a third-party beneficiary of the LPA.

First, GPGH states that section 3.a of the LPA does not benefit GRMD because it was Headwaters and not GRMD that remitted the Rental Payments/Amenity Fees and it was Headwaters that had the option to pay the purchase price and acquire the Leased Premise under the LPA. GPGH further contends that because the LPA does not mention GRMD paying equity under the LPA, GRMD cannot claim an interest in the LPA. Because the LPA prohibited recovery of the Rental Payments/Amenity Fees, GPGH argues that GRMD cannot be a third-party beneficiary based on its right to recover, or its equity in, the Rental Payments/Amenity Fees since third party beneficiaries have no greater rights in a contract than the contracting party.

Next, GPGH contends that Section 26 does not convey a direct benefit on GRMD because in drafting this section, the parties intended to benefit GRH and Headwaters. GPGH also asserts that Section 10 does not directly benefit GRMD because it gave GRH the right to terminate the LPA and benefitted Headwaters by requiring that GRH give it notice prior to terminating the LPA.

Lastly, GPGH contends that GRMD alleges no surrounding facts or circumstances illustrating the contracting parties intent to afford GRMD the benefit of the above cited LPA provisions. It argues that the Fee Resolution and the LPA are separate instruments and that the Fee Resolution was intentionally not included in the LPA. Thus, the fact that GRMD is a party to the Fee Resolution does not prove that the parties intended GRMD to benefit from the LPA.

a. *The rights of the third-party do not need to be expressly recited in the contract, rather, the intent must be apparent from the terms of the agreement and the surrounding circumstances.*

In order to establish standing, a plaintiff must prove (1) that it "suffered an injury-in-fact" and (2) that the "injury was to a legally protected interest." *Wimberly v. Ettenberg,* 194 Colo. 163, 167, 570 P.2d 535, 538 (1977). Under Colorado law, a third-party beneficiary is an individual or an entity that is not a party to an express contract but may nevertheless bring an action on the contract if (1) the parties to the agreement intended to benefit the third party; and (2) if the benefit claimed is a direct and not merely an incidental benefit of the contract. *SK Peightal Engineers, LTD v. Mid Valley Real Estate Sols. V, LLC,* 342 P.3d 868 (Colo. 2015).

GRMD has pled facts which, when viewed in the light most favorable to GRMD, more than meet the standard of showing that it has a "plausible claim" to be a third-party beneficiary of the LPA. It is true that in order for a non-party to be considered a third-party beneficiary under an agreement, the parties to the agreement must have intended to benefit the non-parties and the benefit claimed must be a direct and not merely incidental benefit of the contract. *E.B. Roberts Const. Co. v. Concrete Contractors, Inc.,* 704 P.2d 859, 865 (Colo. 1985). However, under Colorado law, in determining whether a party has standing as a third-party beneficiary to a contract, the Court should look not just to the terms of contract but also to the surrounding circumstances. *E. Meadows Co., LLC v. Greeley Irr. Co.*, 66 P.3d 214, 217 (Colo. App. 2003). *In E. Meadows*, the Court held that in determining whether a party is a third-party beneficiary:

> The key question is the intent of the parties to the actual contract to confer a benefit on a third party. That intent must appear from the contract itself or be shown by necessary implication. It is a question of fact to be determined by the terms of the contract taken as a whole, construed in the light of the circumstances under which it was made and the apparent purpose the parties were trying to accomplish.

66 P.3d 214, 217 (Colo. App. 2003)(*citing Concrete Contractors, Inc. v. E.B. Roberts Construction Co.*, 664 P.2d 722, 725 (Colo.App.1982), aff'd, 704 P.2d 859 (Colo.1985)).

In E.B. Roberts Construction Co., the Colorado Supreme Court found a third party, Concrete Contractors, Inc. ("CCI"), was a third-party beneficiary of a contract between Ideal Construction Services, Inc. ("Ideal") and E.B. Roberts Construction Co. ("Roberts") despite CCI being nowhere mentioned in the contract. Roberts (general contractor) and CCI (subcontractor) had entered into a contract which obligated CCI to perform work as subcontractor. 664 P.2d 722, 861. Subsequently, Roberts, CCI and Ideal entered into a "Contract Amendment" whereby Ideal was substituted for CCI as the subcontractor due to CCI's inability to perform part of the contract. Although Ideal was named as the performing party in this subsequent contract, "CCI performed the work, billed Roberts for progress payments, and received such payments from Roberts." *Id.* at 862. Thus, it was clear from the parties' conduct that they intended for CCI to perform the construction work even though there was never "a formal agreement between Ideal and CCI, or among Ideal, CCI and Roberts . . ." and "[n]othing in the written contract or the bonds, however, [gave] any indication of this arrangement." *Id.* 861-62.

Unlike the situation in *E.B. Roberts*, where third party beneficiary status was found despite the fact that the contract nowhere mentions the third-party, the LPA mentions GRMD expressly in Recital B, which notes that GRMD and Headwaters had previously adopted a Joint Resolution to Establish an Amenity Fee dates May 26, 2005. Specifically, Recital B. provides that the Joint Resolution imposing the Amenity Fee had been adopted "In order to pay rental payments with respect to the Leased Premises and pay the purchase price of the Leased Premises." GRMD jointly adopted an Amenities Fee with Headwaters to allow Headwaters to fund the rental payments for the ski area and golf course and eventually to buy them. The reference to GRMD in recital B.

alone gives rise to a plausible inference that the acquisition of the Amenities was intended by the parties to benefit GRMD.

That intent is even clearer when one reads the Joint Fee Resolution of May 26, 2005, attached to the Amended Complaint as Exhibit 4. The Joint Resolution recites that "the Districts" (GRMD and Headwaters) have determined that it is in the best interests of the Districts to acquire, lease, construct, maintain, provide, operate, and or administer" the Amenities, which include a golf course, ski area, river park and related improvements (Emphasis supplied). The Joint Resolution goes on to note that these Amenities will benefit "the property within the Districts." The inference is strong that the intent of the parties was to confer a direct benefit on GRMD through the rental and acquisition of the amenities. The Joint Fee Resolution is expressly identified in the LPA as the source of rental payments under the LPA, and it is part of the provisions of the LPA.

This reference to the Joint Fee Resolution in the LPA negates GPGH's contentions that GRMD alleges no surrounding facts or circumstances illustrating that the parties intend to afford GRMD the benefits of the above cited LPA provisions. Moreover, it establishes the parties' intent to include the Joint Fee Resolution as part of the LPA. Further, even if the Joint Resolution was not intended to be a part of the LPA (which it was), the Court of Appeals has held that, third party beneficiary status "is a question of fact to be determined by the terms of the contract taken as a whole, construed in the light of the circumstances under which it was made and the apparent purpose the parties were trying to accomplish." *E. Meadows* supra., 66 P.3d at 214. Examination of the Joint Fee Resolution is part of interpreting the LPA as a whole and understanding the circumstances under which it was made and the apparent purpose the parties were trying to accomplish.

GPGH also contends that the LPA does not directly benefit GRMD because it was Headwaters that remitted the Rental Payments/Amenity Fee. However, the circumstances surrounding the LPA, including the relationship between GRMD and Headwaters, undercut this contention. Pursuant to the Master IGA between Headwaters and GRMD, which governed the relationship between the parties until 2016 (the LPA was entered into in 2012), Headwaters was to manage and control the financing of infrastructure, and to establish all necessary service charges including "development fees" for GRMD. Amended Complaint, para.13. It was Headwaters' duty to collect the Amenity Fee, and to use it to fund the acquisition of the golf course and ski area to benefit both GRMD and Headwaters. Viewing the surrounding circumstances in a light most favorable to GRMD, this explains the intention of the parties that Headwaters would use its authority under the Master IGA to collect an Amenity Fee to fund payments under the LPA and confer a direct benefit to GRMD through the acquisition of the ski area, golf course, and other Amenities on behalf of both Districts.

Also, upon the dissolution of Headwaters, it was GRMD that would accept responsibility for the operation and maintenance of any infrastructure located within GRMD. See Amended Complaint, para. 14. Because Headwaters was a developer-controlled entity, it would initially operate and eventually own the Amenities. However, once the SolVista project sold out and the Developer had no interest, it was GRMD that would own and operate the Amenities. GRMD is thus a direct beneficiary of the LPA.

Additional evidence of the circumstances surrounding entry into the LPA support GRMD's status as a third-party beneficiary. Four years before the LPA was concluded, the Town of Granby, Headwaters, GRMD, and the Granby Ranch Metropolitan Districts Nos. 1-8 entered into an Intergovernmental Agreement (the "Granby IGA") which is attached to the Amended Complaint

as Exhibit 5. This Granby IGA provided that "the Districts will be authorized to acquire, construct, own, operate and maintain the ski area and lifts, ski lodge, golf courses and appurtenant clubhouse and maintenance facilities, which included a Fishing Camp on the Fraser River, the 18-hole Headwaters Golf Course, and the Sol Vista Ski Basin. All of these were Amenities that were subsequently leased and to be purchased by Headwaters under the LPA. *See* Amended Complaint, para. 18. "Districts" was once again a defined term in the Granby Ranch IGA, and included Headwaters, GRMD, and the Granby Ranch Metropolitan Districts.

GPGH contends that that GRMD is barred from being a third-party beneficiary to the LPA because the LPA bars the right to recover the payments made under it. Even if the LPA precluded the right to recover the payments made under the LPA, GRMD has also sustained damages unrelated to the payments, specifically its option to purchase the Lease Premises under Section 23. GRMD also contends that it is entitled to the equity that has been built up that is represented by the value of the Amenities less the amount of the lease payments made under the LPA. This is a different remedy than direct restitution of the lease payments, and nothing in the structure of the LPA precludes the claim.

For these reasons, GRMD has stated a plausible claim to third party beneficiary status under the LPA, and that it has suffered injury in fact to a legally protected interest. GPGH's motion to dismiss must be denied.

II. GPGH Breached the LPA when it refused to be bound as Landlord to Headwaters and has refused to accept the purchase provisions of Section 23 of the LPA.

GPGH asserts that GRMD misconstrues section 26 of the LPA by claiming that GPGH breached the LPA by not providing Headwaters with a Non-Disturbance Agreement. In support of

this, GPGH claims that Section 26 sets forth no requirement that the Landlord request the Tenant to subordinate or that anyone provide a Non-Disturbance Agreement. Rather, GPGH argues that the LPA provided only that, if no Non-Disturbance Agreement was requested by Landlord or provided to Headwaters, Headwaters was not required to subordinate Headwaters' interest under the LPA to a deed of trust.

When it pled this claim, GRMD was under the impression that there had been subsequent extensions of credit by Redwood Capital or other lenders which should have been subject to the subordination clause of Section 26, and that GPGH had failed to provide an agreement as described in Section 26. However, investigation into the foreclosure of the 2005 Redwood Capital Deed of Trust and a reading of the LPA in light of that proceeding have revealed that Headwaters did obtain an agreement executed by Redwood Capital obligating Redwood Capital as lender, and any successor, to be bound by the LPA including but not limited to the rights of Headwaters to acquire the Amenities under Section 23 of the LPA.

For these reasons, GRMD pleads in its Amended Complaint, that GPGH breached the LPA by refusing to be bound as Landlord to Headwaters and to comply with the purchase provisions under section 23.

Likewise, Section 13.b. provides that,

> In connection with the execution of this Lease, Landlord has delivered to Tenant, an agreement executed by the Lender either subordinating this Lease to the deed of trust held by the Lender but obligating the Lender *and any successor thereto* to be bound by this Lease and by all of Tenant's rights hereunder . . . including but not limited to the rights of Tenant conferred by Sections 2 and 23 hereof.

(emphasis added).

Section 26 further provides 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…."

GPGH, as a successor in interest to Redwood Capital, is bound by the LPA, including the terms set forth under Section 13 and 26 of the LPA. Assuming that the Subordination, Non-Disturbance, and Attornment Agreement referenced in Section 13 of the LPA was executed and delivered, as is admitted by the parties in the LPA, GPGH was obligated to act as Landlord and accept the purchase provisions of Section 23.

For these reasons, GPGH has breached Sections 13, 23, and 26 of the LPA.

III. GPGH is an Intended Beneficiary of the Contract and Properly Maintains a Claim for Tortious Interference

GPGH asserts that GRMD's third claim for relief fails because (1) GRMD lacks standing and (2) GRMD does not allege interference with another's contract. As detailed above, GRMD is a third-party beneficiary to the LPA because they received direct, intended benefits under the LPA. Specifically, upon breach of the LPA, GRMD was no longer able to collect the Amenity Fees and no longer had the prospect of owning the Leased Premise upon Headwater's acquiring the property under the LPA.

Under Colorado law, in order to prove there was tortious interference with a contract, the Plaintiff must prove that (1) the plaintiff had a contract; (2) the defendant knew or reasonably should have known of the contract; (3) the defendant by words or conduct, or both, intentionally caused the nonperformance or termination of the contract; (4) the defendant's interference with

the contract was improper; and (5) the defendant's interference with the contract caused the plaintiff damages. *Galleria Towers, Inc. v. Crump Warren & Sommer, Inc.*, 831 P.2d 908, 910 (Colo. App. 1991).

As discussed above, the parties to the LPA intended for GRMD to benefit from the LPA and can thus maintain a claim for tortious interference as a third-party beneficiary to the LPA. As a successor in interest to the LPA, GPGH was fully aware of its obligations to Headwaters (and GRMD) under the LPA. Specifically, GPGH was aware of the termination requirement under the LPA and that the failure of Headwaters to operate the Amenities would trigger termination under Section 10. GPGH intentionally tried to prevent Headwaters from operating the Amenities and hired another company to operate the Amenities. Specifically, on October 12, 2020 Granby Ranch informed the residents via email that GPGH had contracted with two outside entities to operate the golf and ski Amenities. As discussed above, once the LPA was terminated, GRMD was no longer able to benefit from the collection of the Amenity Fee. For these reasons, there was tortious interference with the LPA by GPGH.

In its motion to dismiss, GPGH claims that GRMD cannot maintain a claim for tortious interference because "a defendant cannot be liable for interference with its own contract." *MDM Grp. Assocs. v. CX Reinsurance Co. Ltd.*, 165 P.3d 882, 886 (Colo. App. 2007) (holding a plaintiff "cannot maintain an action against [defendant] for tortious interference with any contract to which [defendant] is a party"). In *MDM Grp. Assocs*., the court held that a defendant cannot be liable for interference with its own contract because "Neither party is a stranger to the contract. Each party has agreed to be bound by the terms of the contract itself . . . ." While it is true that GPGH is *now* a party to the LPA, it was not a party to it when the LPA and specifically the obligations under Section 10 were entered into. Although a successor in interest that was obligated to be bound by

the terms of the LPA, GPGH did not agree with those terms and set out to have the LPA terminated so it did not have to comply it. For these reasons, GPGH tortiously interfered with the LPA.

IV. GRMD's Seventh Claim states a Plausible Claim for Relief against GPGH.

In Section 3, pages 17-20 of its Motion to Dismiss, GPGH argues that GRMD has failed to state a claim for a declaratory judgment against GPGH. This claim was pled as the Fifth Claim in the original Complaint; it is now the Seventh Claim in the Amended Complaint. Additional facts supported by documentary evidence have been pled in the amended claim, and GPGH's motion fails as a matter of law.

First, the covenants, conditions and agreements set forth in the LPA are covenants running with the land, and they are not abrogated by any foreclosure action, judicial or through the public trustee. In order for a covenant to run with the land, not only must the parties to the covenant intend that it do so, but the covenant must touch and concern the land, that is, it must closely relate to the land, its use, or its enjoyment. *Lookout Mountain Paradise Hills Homeowners' Ass'n v. Viewpoint Associates*, 867 P.2d 70, 74 (Colo. App. 1993). Whether a covenant runs with the land turns on the construction of relevant documents. *Id.* In Section 28 e. of the LPA, Headwaters and GRH recited as follows:

> This instrument shall also bind and benefit, as the case may require, the heirs, legal representatives, assigns and successors of the respective Parties, and all covenants, conditions and agreements herein contained shall be construed as covenants running with the land.

In *Lookout Mountain*, supra., the Court of Appeals held that a phrase in a declaration of covenants that "the covenants herein set forth shall run with the land and bind the present owner,

its successors and assigns" demonstrated by express language that the covenant was intended to run with the land.

The LPA also touches and concerns the Leased Premises. It closely relates to the use and enjoyment of the land by creating a possessory interest in Headwaters. It concerns the land itself, because it provides for its purchase and, if the purchase is not completed, automatic transfer to Headwaters in 2062.

The LPA is a covenant running with the land. Unlike personal covenants, which operate like a general contract provision and bind only the actual parties to the covenant, real covenants run with the land and burden or benefit successors in interest. Id. This includes GPGH. As the Court of Appeals reasoned in *Fisk v. Cathcart*, 3 Colo. App. 374, 33 P. 1004 (1893), what a purchaser who takes property subject to an encumbrance receives is an equity of redemption, which includes the right to enforce covenants which run with the land under antecedent instruments. Under the logic of *Lookout Mountain*, the successor is also subject to the burdens of the covenants. The public trustee foreclosure of the 2005 Redwood Capital Deed of Trust, the issuance of a certificate of purchase to Granby Prentice, and the assignment of that Certificate to GPGH (Amended Complaint, para. 34) did nothing to terminate the covenant running with the land created by the LPA.

Further, if there had been a default under the LPA (which never actually happened) the LPA could only be extinguished through a foreclosure action brought in the courts. An installment land contract is essentially a security transaction and is characterized by the following elements: (1) the owner's agreement to sell and the buyer's agreement to buy; (2) the promise of the buyer that he will make payments, usually over a long period of time and in installments, that he will keep the premises insured, etc.; (3) the seller's promise that he will deliver a deed when the

payments have been completed; and (4) an agreement that, in the event of default by the buyer in making the payments or performing the other covenants contained in the instrument, the seller may declare the contract at an end and retain the payments made as liquidated damages. *Grombone v. Krekel*, 754 P.2d 777, 778 (Colo. App. 1988).

The LPA meets all of the elements of an installment land contract. First, section 4.a. of the LPA provides that "the Tenant shall be entitled to acquire the Leased Premises at the end of the last Renewal Term . . . ." Likewise, section 23.b provides that "in addition to the acquisition by payment of the Purchase Price, Tenant shall acquire the Leased Premise on December 31, 2062 if this lease has not otherwise been terminated…." This indicates that the Landlord/Owner, GRH agreed to sell and the Tenant, Headwaters agreed to purchase the Leased Premise.

Secondly, the LPA provides that the Landlord shall lease the property to the tenant and that the lease shall automatically renew for 49 additional one-year terms. *See* LPA sections 1.a. and 2. This satisfies the second element and exhibits a promise of the buyer to make payments over a long period of time. Thirdly, section 13.a. of the LPA provides that upon Tenant keeping and performing the agreements and obligations of the Lease, they shall have the right to acquire the Leased premise in accordance with section 23. Section 23.e provides that upon the closing date, the Landlord will deliver to Tenant a warranty deed for the Leased Premises free and clear of any material lien or encumbrance created by or arising through Landlord . . . ." This satisfies the third element of an installment land contract. Lastly, section 24.a provides that if the Tenant fails to pay under the LPA or if they breach any other covenants, the Landlord may terminate the lease. Lastly, as GPGH points out in its Motion, Section 3.a of the LPA states that the Rental Payments would never be returned to Headwaters, even if the LPA Terminated. Under this provision, the Landlord

was able to retain any and all prior payments as liquidated damages, which satisfied the last element.

Often times, courts choose to treat an installment land contract as a mortgage and require foreclosure to be done through the courts. The factors to be used by the trial court in determining whether to treat an installment land contract as a mortgage include the amount of the vendee's equity in the property, the length of the default period, the willfulness of the default, whether the vendee has made improvements, and whether the property has been adequately maintained. *Woods v. Monticello Develop Development Co.,* supra; *Terre Grande, Inc. v. Four Corners Oils & Minerals Co.*, 262 F.Supp. 964 (D.Colo.1967).

The LPA meets these factors. First, the parties had been performing under the lease for over 14 years at the time of the foreclosure, this includes 14 years of rental payments which went towards the amount of Headwaters' equity in the property. Additionally, GRMD had paid out approximately 6.1 million to Granby Realty Holdings under the LPA since 2006. In looking to the willfulness of the default, as it applies here, the default was not on behalf of Headwaters, rather the Landlord, Granby Realty Holdings defaulted on a loan agreement it entered into with GPGH, and the Leased Premise were used to secure this obligation. As such, GPGH became the successor in interest to Granby Realty Holdings under the LPA.

Thus, the LPA is a covenant running with the land, binding upon the parties and their successors in interest, and it cannot be abrogated by any foreclosure, judicial or otherwise. Further, if the Districts' equity of redemption were to be wiped out, it could only be through a judicial foreclosure where one of the issues would be the existence of a default under the LPA. The Seventh Claim for Declaratory Relief states a plausible claim.

CONCLUSION

WHEREFORE, Plaintiff Granby Ranch Metropolitan District respectfully requests that this Court deny Defendant GPGH's Motion to Dismiss.

Dated this 21st day of May, 2021.

NORTON & SMITH,
A Professional Corporation

s/ Charles E. Norton
Charles E. Norton, #10633
Alicia M. Garcia, #53860
Counsel for Plaintiff

CERTIFICATE OF SERVICE

I certify that on the 21st day of May, 2021, a true and correct copy of the foregoing was served electronically and/or sent via U.S. Mail, postage prepaid to the following:

Mark Champoux, # 40480
Kyler Burgi, # 46479
DAVIS GRAHAM & STUBBS LLP
1550 17th Street, Suite 500
Denver, Colorado 80202
Telephone: 303.892.9400
mark.champoux@dgslaw.com
kyler.burgi@dgslaw.com
Attorneys for Defendant GP Granby Holdings, LLC

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
Telephone: (303) 691-3737
MNathan@ndm-law.com
ANathan@ndm-law.com
Attorneys for Defendant Headwaters Metro. District

S/ Wynter B. Wells
Wynter B. Wells, Paralegal
NORTON & SMITH, P.C.