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| DISTRICT COURT, GRAND COUNTY, COLORADO<br>Court Address: Grand County Combined Courts<br>307 Moffat Ave<br>Hot Sulphur Springs, CO 80451<br>Telephone No.: (970) 725-3357 | |
| **Plaintiff:** GRANBY RANCH METROPOLITAN DISTRICT, a quasi-municipal corporation and political subdivision of the State of Colorado,<br><br>**v.**<br><br>**Defendants:** HEADWATERS METROPOLITAN DISTRICT, a quasi-municipal corporation and political subdivision of the State of Colorado; and GP GRANBY HOLDINGS, LLC. | **▲COURT USE ONLY▲**<br><br>Case No.: 2021CV030008<br><br>Div.: Rm.: |
| *Counsel for Plaintiff:*<br>Charles E. Norton, #10633<br>Alicia M. Garcia, #53860<br>NORTON & SMITH, P.C.<br>600 17th Street, Suite 2150S<br>Denver, Colorado 80202<br>Phone Number: (303) 292-6400<br>FAX Number: (303) 292-6401<br>E-mail: CNorton@NortonSmithLaw.com<br>AGarcia@NortonSmithLaw.com | |

**PLAINTIFF'S RESPONSE BRIEF IN OPPOSITION TO DEFENDANT HEADWATERS METROPOLITAN DISTRICT'S MOTION TO DISMISS PURSUANT TO C.R.C.P. 12(B)(1) & (5)**

Plaintiff Granby Ranch Metropolitan District ("GRMD") through its undersigned counsel, submits this Response Brief in Opposition to Defendants Headwaters Metropolitan District's ("Headwaters") Motion to Dismiss Pursuant to C.R.C.P. 12(b)(1) & (5).

## 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**

While Headwater's Statement of Facts contains accurate quotations from the LPA, it omits a number of material facts that are essential in understanding the intent of the parties to the LPA and the strategy undertaken by the original defendants Headwaters and GPGH, aided by the new defendants Redwood Capital Finance Co., LLC ("Redwood") and Granby Prentice LLC to deprive GRMD of the benefit of the bargain to rent and purchase a golf course and ski area that had originally been struck on its behalf. This Response to Statement of Facts shall be drawn from the Amended Complaint.

Headwaters came into existence pursuant to a Service Plan approved by the Town of Granby and dated March of 2003. Headwaters was originally called Sol Vista Metropolitan District No. 1; its name was changed to Headwaters on October 23, 2004. Plaintiff GRMD (called Sol Vista Metropolitan District No. 2) was organized at the same time through a separate Service Plan. Its name was changed to Granby Ranch Metropolitan District, also on October 23,

2004. The two service plans are attached as Exhibits 1 and 2 to the Amended Complaint. Both Service Plans contemplated that multiple districts may be organized whose boundaries would include the residential areas of Granby Ranch and major amenities including a golf course, fishing access rights, and a ski area.

Headwaters covers a geographic area of approximately 7 acres, versus about 3,563 acres for GRMD. This disparity may seem puzzling until it is understood that Headwaters was to be the "Service District," and GRMD the "Taxing District." As is a common practice for development projects taking advantage of the Special District Act, when the two Districts were first organized, the property was owned entirely by a private development company, in this case SolVista Corp. (This entity later became the developer Granby Realty Holdings, LLC, or "GRH."). SolVista conveyed property interests in small tracts of land, either through outright conveyance or options to purchase. This would qualify the transferees to vote in Headwaters and GRMD elections pursuant to C.R.S. 32-1-103(5)(a), C.R.S., and to petition for the organization of the district and submit a proposed service plan.

Initially, the Boards of Directors of both GRMD and Headwaters consisted of principals, owners, managers, and consultants of the Developer. As residential lots were sold in GRMD, more and more residents would own property and qualify to vote in special district elections. By contrast, Headwaters was set up to consist only of a small tract of open space and a portion of a condominium building including a unit owned by Marise Cipriani, a principal and manager of SolVista. Using this method, Headwaters would always be controlled by the Developer, which would lose control of GRMD as residents acquired lots, built homes, and took an interest in the affairs of the District.

As the Service District, the Developer-controlled Headwaters ran the affairs of GRMD. Under the "Master Intergovernmental Agreement ("Master IGA"), attached to the Headwaters Service Plan, the Service District was to "manage and control the financing" of infrastructure, budget monies for public purposes, adopt uniform rules and regulations for administrative and operational purposes, and establish all necessary service charges including "development fees." Master IGA, pp. 5-6. The Service District, Headwaters, was to own and operate the infrastructure until it was transferred to the Town of Granby or another public agency. *Id*. at section 4.1g. The Service District was responsible for the construction of the infrastructure and to arrange for the financing of it. Master IGA, Sections 4.2 and 4.3. As section 4.4 of the Master IGA succinctly put the point, "the Service District shall manage and administer all business affairs of the Districts."

The responsibilities of the Taxing Districts (eventually GRMD and Granby Ranch Metropolitan Districts Nos. 2-8) were limited but crucial. GRMD was to impose the required mill levy to pay debt obligations incurred by the Districts, including Headwaters. Master IGA, Section 5.1. Also, pursuant to Section 5.2 of the Master IGA, GRMD was to adopt, impose, collect, and remit to the Service District "such rates, fees, tolls and charges as are established by the Service District" to fund its administrative and operating expenses. Upon the dissolution of the Service District (Headwaters), GRMD was to accept responsibility for the operation and maintenance of any infrastructure located within the Taxing District. Master IGA, Section 5.4.

On May 26, 2005 Headwaters and GRMD passed a Joint Resolution to Establish a Facilities Fee, a document which is mentioned expressly in Recital B to the LPA. This Fee Resolution, which is attached as Exhibit 4 to the Amended Complaint, established that Headwaters would impose and collect an Amenity Fee in coordination with GRMD. The recited

purpose of this Fee was "to provide a source of funding to pay for costs incurred by the Districts (defined as Headwaters and GRMD) for the financing, acquisition, installation, and/or replacement of the Amenities...and such fees and charges are necessary for the prosperity and general welfare of the Districts and their inhabitants..." The Amenities were defined as including a "golf course, ski area, river park and related improvements..."

In 2007, the Granby Ranch Metropolitan Districts Nos. 2-8 were formed under a Service Plan approved by the Town of Granby on September 25, 2007. A copy of this Consolidated Service Plan is attached to the Amended Complaint as Exhibit 3.

On February 26, 2008, the Town of Granby, Headwaters, GRMD, and the Granby Ranch Metropolitan Districts Nos. 2-8 entered into an Intergovernmental Agreement (the Granby IGA) which is crucial to understanding the LPA. A copy of the Granby IGA is attached to the Amended Complaint as Exhibit 5.

Section 5 of the Granby IGA provided that "In addition to the types of park and recreation services and facilities referenced to or reflected in the Service Plans, including the exhibits thereto, 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, fishing or river park facilities and programs, and parks, trails and open space for various recreational purposes as more fully described in Exhibit A, attached hereto and incorporated herein by reference, collectively called the "**Amenities**." The Amenities listed on Exhibit A included a "Fishing Camp" on the Fraser River, the 18-hole Headwaters Golf Course, the SolVista Ski Basin, and parks, trails, and recreation areas within the Granby Ranch property.

It is important to note that the term "Districts" was defined on page 1 of the Granby Ranch IGA. The term included Headwaters, GRMD, and the Granby Ranch districts Nos. 2-8.

All of these entities were collectively given the power to acquire the Amenities. In order to defray the costs of this acquisition, the Districts were authorized to impose and collect a one-time, front end Amenities Fee, in an amount not to exceed $10,000.00 per lot or equivalent dwelling unit. *See* Granby IGA, Section 5(c).

In return, the Districts agreed to provide preferred access in the Amenities to Town residents, who would also receive a discount on green fees for the golf course and daily ski passes. The preferred access was to be given higher for the Town residents than the general public, but not higher than for residents of the Districts.

The Granby IGA noted that the Amenities were not items required by the Town ordinances or other authorities to be dedicated or conveyed to the Town. The Granby IGA does provide that property interests and assets needed for Amenities that would be acquired from the Developer shall be acquired at prices that do not exceed fair market value as established by a qualified appraiser. *See* Section 5(b). This requirement was reproduced in Section 23 of the LPA.

The LPA was the consummation of this vision in the Granby IGA that the Amenities would be under public ownership. It is attached to the Amended Complaint as Exhibit 6. In Recital B., the LPA notes that "in order to pay rental payments with respect to the Leased Premises and to pay the purchase price of the Leased Premises," Headwaters had "previously adopted, with the Granby Ranch Metropolitan District, a Joint Resolution to Establish an Amenity Fee..." In Section 23 of the LPA, Headwaters and the developer, GRH, agreed that the "Purchase Price" for the Amenities would be the lesser the Adjusted Appraisal Value of the Leased Premises subject to increases for the value of capital improvements adjusted for inflation and all Amenity Fees collectable by Headwaters under the Amenity Fee Agreements and the Fee

Resolution. The Amenities would also pass to the Tenant on December 31, 2062 if the Lease had not been terminated in accordance with Section 2(a), and (b) or (c) of the LPA.

"Rental Payments" under the LPA were restricted to "any Amenity Fee imposed pursuant to the Fee Resolution and the Fee Agreement." The Parties acknowledged that "due to the nature of the due dates of the Amenity Fees, as set forth in the Fee Resolution and the Fee Agreement, the amount of Amenity Fees received by the Tenant (Headwaters) may fluctuate greatly from month to month and year to year." LPA, Section 3. The plain language of the LPA leads to the conclusion that if no Amenity Fees were collected in a given year, the Rent would be zero.

In Section 13 of the LPA, "Title and Possession," GRH represented to Headwaters that it had the full right to enter into the LPA and to perform its obligations under the LPA, including without limitation the sale of the Leased Premises in accordance with Section 23, without the consent or approval of any other party. These other parties expressly included "the lenders indicated as beneficiaries to the Deed of Trust, Assignment of Rents, Security Agreement and Fixture Filing from Granby Realty Holdings, LLC, a Colorado limited liability company to the Public Trustee of Grand County for the use of Redwood Capital Finance Company, LLC, a Delaware limited liability company, recorded June 2, 2005 at Reception No. 2005-005679, as amended (the 2005 Redwood Capital Deed of Trust)."

The parties also acknowledged that the Leased Premises were subject to the Redwood Capital Deed of Trust, and that GRH would cause a Subordination, Non-Disturbance and Attornment Agreement to be delivered to Headwaters. However, the parties also exchanged "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 (to the extent that such Lender should succeed to the interest of

Landlord and/or acquire title or right of possession of the Leased Premises) including but not limited to the rights of Tenant conferred by Sections 2 and 23 hereof. Such agreement provides that, notwithstanding any other agreement with the Landlord, the Lender's consent shall not be required to permit the acquisition of the Leased Premises by the Tenant in accordance with the terms hereof."

On November 8, 2016, the Town of Granby, Headwaters, GRMD, and the Granby Ranch Metropolitan Districts Nos. 2-8 entered into an Amended and Restated Intergovernmental Agreement replacing the Granby IGA (the "Second Granby IGA"), which is attached to this the Amended Complaint as Exhibit 7. In this Second Granby IGA, Section 5 a., the parties re-affirmed the authority of "the Districts" to acquire the ski area and lifts, ski lodge, golf courses and appurtenant clubhouses and maintenance facilities. Exhibit A to the Second Granby IGA lists the same Amenities as the original Granby IGA that could be acquired by the Districts.

By the date of the Second Granby IGA, Headwaters remained under the control of the developer GRH, but GRMD was under homeowner and lot owner control. The other Granby Ranch Metropolitan Districts Nos. 2-8 were in undeveloped areas of Granby Ranch and so they also remained under control of the developer. GRMD and its homeowner-controlled Board were dissatisfied with the state of the infrastructure developed by Headwaters as the Service District, particularly the roads within Granby Ranch.

As a result of this dispute, the Districts collectively amended their Service Plans to eliminate any relationship between Headwaters as the service district and the other Granby Ranch Districts, including GRMD, as the tax districts. In a document entitled "Termination of Intergovernmental Agreement" between GRMD, Granby Ranch Metropolitan Districts Nos. 2 through 8, and Headwaters, dated November 17, 2017 (the "Termination IGA"), the parties

agreed to terminate the prior master IGAs under which the Granby Ranch districts would finance the roads and other related infrastructure within Granby Ranch and Headwaters would construct and operate that infrastructure. In Recital G. of the Termination IGA, the parties indicated their intent that GRMD should operate independently of Headwaters. A copy of the Termination IGA is attached to the Amended Complaint as Exhibit 8.

It is important to note that at this stage of the proceedings, there has been no evidence that the Second Granby IGA was terminated or that the authority that the Town of Granby had given to "the Districts" to purchase the Amenities had been taken away. The LPA was entered into in 2012 pursuant to the authority granted by the original Granby IGA, which was dated in 2008, and that authority was reaffirmed in the Second Granby IGA in 2016.

According to a letter dated September 1, 2020, from Christopher L. Richardson, counsel for defendant GPGH, to Mr. Clint Waldron, counsel to Headwaters, the interest in the 2005 Redwood Capital Deed of Trust was somehow transferred to an entity called Granby Prentice, LLC. Mr. Richardson described Redwood Capital as the "predecessor in interest" to Granby Prentice. According to the website maintained by the California Secretary of State, the business address of Granby Prentice is identical to that of the Redwood Capital Finance Company, LLC, 10100 Santa Monica Boulevard, Los Angeles, California, 90067.

Granby Prentice initiated a foreclosure by filing a Notice of Election and Demand as to the 2005 Redwood Capital Deed of Trust on March 24, 2020. The LPA had previously been recorded in the real property records of Grand County on January 3, 2020 at Reception No. 2020000067. At the time the foreclosure was initiated, Granby Prentice had both actual and constructive knowledge that its predecessor in interest, Redwood Capital, had agreed to be bound by the LPA including the right of Headwaters to purchase the Amenities.

On August 14, 2020, the Public Trustee held a public sale of the Leased Premises under the LPA. Granby Prentice's bid of $25,000,000 was the highest and only bid. The Public Trustee issued a Certificate of Purchase for the subject property, including the Leased Premises, to Granby Prentice. Granby Prentice assigned this Certificate of Purchase to the defendant GPGH. Perhaps unsurprisingly, GPGH has the same Los Angeles business address as Redwood Capital and Granby Prentice.

From the time of Mr. Richardson's correspondence of September 1, 2020 through the filings of the motions to dismiss by Headwaters and GPGH, GPGH has taken the position that the LPA was wiped out by the public trustee foreclosure. At no time has it been noted that Redwood Capital delivered an agreement to Headwaters at the time the LPA was entered into stating that Redwood Capital and its successors would be bound by the terms of the LPA, including the right of Headwaters to purchase the Amenities and related property.

## STANDARD OF REVIEW

Headwaters filed this motion to dismiss under C.R.C.P. 12(b)(1) for lack of subject matter jurisdiction, and 12(b)(5) for failure to state a claim upon which relief can be granted. 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, 39 Media L. Rep. (BNA) 2211 (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. GRMD is a third-party beneficiary to the LPA and thus has standing to bring this suit.

In its motion to dismiss, Headwaters contends that GRMD lacks standing to bring this suit because it is not a third-party beneficiary of the LPA. In support of this statement, Headwaters argues that LPA did not confer any direct benefit on the GRMD because (1) GRMD's claims are

premised solely on provision 26 of the LPA and that the Fee Resolution or GRMD (or another third party) was never mentioned in provision 26; (2) the LPA only 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 Lease Premise and not in the context of collecting amenity fees or GRMD's role in collecting amenity fees and thus the parties did not intended to benefit GRMD by allowing Headwaters to collect the amenity fees; and (3) the LPA is final and entire statement of the parties and thus bars any attempt by GRMD to incorporate the Fee Resolution.

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 Headwaters had previously adopted, with the Granby Ranch Metropolitan District, a Joint Resolution to Establish an Amenity Fee dated May 26, 2005. In its Motion to Dismiss, Headwaters makes light of this reference, saying that it is not located in the provisions of Section 26 regarding subordination or the provisions of the LPA giving Headwaters an option to purchase. However, Headwaters simply ignores the very first phrase in Recital B., which notes 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. This reference 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 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.

Headwaters responds that this Court is forbidden from looking at the Joint Fee Resolution because of the integration clause located in 28 e. of the LPA which states that the provisions of this Lease (defined as the entire LPA) shall constitute the entire Lease (LPA). However, the interpretation of a written document is a question of law. *Shaw v. Sargent School District No. RE-33-J*, 21 P. 3d 446, 449 (Colo. App. 2001), *citing In re Trusts Created by Ferguson*, 929 P.2d 33 (Colo.App.1996). If the language of the document is plain, its meaning clear, and no absurdity is involved, it must be enforced by the court as written. *Hudgeons v. Tenneco Oil Co.*, 796 P.2d 21 (Colo.App.1990). 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. It may be examined by this Court in interpreting the LPA under Section 28 e.

Further, even if the Joint Resolution were deemed to be extrinsic evidence under the merger clause (which it is not) it is admissible because it is being used to explain the LPA, not to vary its terms. *Centennial-Aspen II Ltd. Partnership v. City of Aspen*, 852 F.Supp. 1486, 1493 (D.C. Colo. 1995) (parol evidence admissible to explain a contract despite the existence of a merger and integration clause). As the Court of Appeals has held, 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.

Headwaters makes much of the fact that it collected the fee and remitted it to the Landlord GRH, which it says leads to the conclusion that GRMD was not an intended third-party beneficiary. 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.

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. Headwaters' motion to dismiss must be denied.

## II. The Arguments in Headwaters' motion to dismiss, Legal Argument, section 2, pages 11-13 have been mooted by the filing of the Amended Complaint.

Headwaters moved to dismiss GRMD's second claim for relief, which was based upon Section 26 of the LPA. 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 Headwaters had failed to obtain 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 it, 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 this reason, the Amended Complaint omits the claims against Headwaters under section 26, and substitutes a Second Claim for Relief against Headwaters for its breach of a contractual duty under the Master IGA, Granby Ranch IGA, and Second Granby IGA to acquire the Amenities on behalf of GRMD.

## III. Headwaters' Motion to Dismiss GRMD's claim for breach of the covenant of good faith and fair dealing, pages 14 to 16, has also been substantially mooted by the filing of the Amended Complaint, which pleads facts sufficient to state a plausible claim for breach of the covenant.

In section 3 of its Motion to Dismiss, Headwaters contends that GRMD's good faith and fair dealing claim must also be dismissed because it fails to allege a cognizable breach. This contention was based heavily on GRMD's original complaint and the claimed breach of Section 26 of the LPA. That claim has now been replaced by the Sixth Claim for Relief in the Amended Complaint which is not reliant upon Section 26. For this reason, the motion to dismiss has been mooted.

Anticipating future motions practice in this case, GRMD maintains that the Fifth Claim for Relief states a plausible claim. The implied covenant of good faith and fair dealing exists in every contract to enforce reasonable expectations of the parties. *Amoco Oil Co. v. Ervin*, 908 P.2d 493, 498 (Colo. 1995). Good faith performance of a contract involves "faithfulness to an agreed common purpose and consistency with the justified expectations of the other party." *Id.* (*citing Wells Fargo Realty Advisors Funding, Inc. v. Uioli, Inc.*, 872 P.2d 1359, 1363 (Colo. App. 1994)).

The implied covenant of good faith and fair dealing may be relied upon where one party has discretion with respect to performance of specific terms of the contract. *New Design Constr. Co., Inc. v. Hamon Contractors, Inc.*, 215 P.3d 1172 (Colo. App. 2008). The good faith performance doctrine serves to effectuate the intentions of the parties or to honor their reasonable expectations. *Bayou Land Co. v. Talley*, 924 P.2d 136 (Colo. 1996); *State Farm Mut. Auto. Ins. Co. v. Nissen*, 851 P.2d 165 (Colo. 1993); *ADT Sec. Servs., Inc. v. Premier Home Prot., Inc.*, 181 P.3d 288 (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." *Wells Fargo Realty Advisors Funding, Inc.*, 872 P.2d at 1363.

In Colorado, a third-party beneficiary has standing to enforce the covenant of good faith and fair dealing. *In Bloom v. National Collegiate Athletic Association*, 93 P.3d 621, 624 (Colo. App. 2004), the Court of Appeals held that a student athlete had standing to pursue a claim for violation of the covenant of good faith and fair dealing that was implied in the contractual relationship between the NCAA and its member institutions (in that case, the University of Colorado).

Under the well-pleaded facts of the Amended Complaint, Headwaters breached its implied covenant in a number of ways. First, it willfully refused to assert its rights against GPGH as the successor in interest to Redwood Capital under the LPA. Under section 13 of the LPA, Headwaters and the original developer, GRH, acknowledged that the Lender, Redwood Capital, had agreed to be bound by the LPA including the option to purchase held by Headwaters. By implication in reading section 26 of the LPA, Redwood Capital agreed to assume the role of Landlord under the LPA. Under the express language of the LPA, that obligation was passed on to Redwood's successors. Despite this, Headwaters did nothing to assert its rights and thereby protect the Districts' opportunity to purchase the Amenities.

Instead, Headwaters participated in a sham series of terminations and retention agreements with operators for the ski area and golf course, all so GPGH could argue that the LPA had been terminated since Headwaters had not operated the Amenities for a thirty-day period. These facts state more than a plausible claim for violation of the covenant of good faith and fair dealing.

## CONCLUSION

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

Dated this 21st day of May, 2021.

NORTON & SMITH,
A Professional Corporation

*s/ Charles E. Norton*
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*Counsel for Plaintiff*

## CERTIFICATE OF SERVICE

I certify that on the 21st day of May, 2021, a true and correct copy of the foregoing **PLAINTIFF'S RESPONSE BRIEF IN OPPOSITION TO DEFENDANT HEADWATERS METROPOLITAN DISTRICT'S MOTION TO DISMISS PURSUANT TO C.R.C.P. 12(B)(1) & (5)** was served electronically and/or sent via U.S. Mail, postage prepaid to the following:

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