DISTRICT COURT, GRAND COUNTY, COLORADO
307 Moffat Avenue
Hot Sulphur Springs, CO 80451

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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; GRAY JAY VENTURES, LLC.; REDWOOD CAPITAL FINANCE CO., LLC, GRANBY PRENTICE, LLC; and GR TERRA, LLC.

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Case No. 2021CV30008

Division 1

DEFENDANTS GRAY JAY VENTURES LLC, F/K/A GP GRANBY HOLDINGS, LLC, GRANBY PRENTICE LLC, AND GR TERRA LLC'S MOTION TO DISMISS SECOND AMENDED COMPLAINT

Pursuant to C.R.C.P. 12(b)(1) and (5), Defendants Gray Jay Ventures LLC, f/k/a GP Granby Holdings, LLC ("Gray Jay"), Granby Prentice LLC ("Granby Prentice") and GR Terra LLC ("GR Terra") (all of the foregoing are collectively referred to as the "Private Defendants"), move to dismiss the Second Amended Complaint filed by Plaintiff Granby Ranch Metropolitan District's ("GRMD").[1]

INTRODUCTION

Granby Ranch is a real estate development located near Granby, Colorado. It consists of a ski resort, golf course, and related recreational facilities, as well as thousands of developed and undeveloped residential lots. The development suffered from years of diminished lot sales, inconsistent operations and deferred maintenance, leading to foreclosure of the property in 2020. Defendant Granby Prentice had the winning bid for the property at the foreclosure sale and transferred its rights to Defendant Gray Jay, which took title to the property upon expiration of the redemption periods. In May of 2021, Defendant GR Terra purchased the property from Gray Jay with a plan to invest the resources needed to enable the development to reach its full potential.

Despite these recent efforts to put Granby Ranch on a sustainable path for the future, a minority faction of residents who control GRMD – just one of the many residential metropolitan districts at Granby Ranch – have filed this suit seeking to impose restrictions on the property and financial obligations on the current and former property owners as well as Defendant Headwaters Metropolitan District ("Headwaters"). Headwaters is a public body created pursuant to the

[1] **Certificate of Conferral:** Pursuant to C.R.C.P. 121, § 1-15(8), the undersigned has conferred with counsel for GRMD. GRMD opposes the requested relief.

Colorado Special District Act, to finance, construct, manage, and operate public facilities and services throughout the development.

GRMD's claims against the Private Defendants in the Second Amended Complaint ("Amended Complaint" or "Am. Compl.") are all based upon a 2012 agreement (the "LPA") between Headwaters and GRH, the development's pre-foreclosure owner, that granted Headwaters a lease and option to purchase certain Granby Ranch amenities.

Specifically:

- Counts I, IV, V attempt to assert claims for breach of the LPA against Gray Jay, Granby Prentice and GR Terra respectively.
- Count VI attempts to claim tortious interference with the LPA against Gray Jay and Granby Prentice.
- Count VII attempts to assert breach of the covenant of good faith and fair dealing in the LPA against Gray Jay.
- Count VIII seeks declaratory relief against Gray Jay and GR Terra in the form of a declaration that the LPA was not terminated.[2]

Therefore, all the claims against the Private Defendants turn upon GRMD's alleged right to enforce the LPA. Those claims all fail because GRMD lacks standing to seek to enforce the LPA. GRMD did not sign the LPA, was not a successor in interest to any party to the LPA, and it was not an intended third-party beneficiary. No provision of the LPA expressed any intent to confer a direct benefit on GRMD. As such, GRMD has no standing to allege any breach of or interference with the LPA, and likewise has no standing to seek declaratory relief to reinstate the

[2] Count II is a breach of contract claim against Headwaters, and Headwaters is also named as a defendant in Count VII. Headwaters has filed its own motion to dismiss with respect to the claims against it. Likewise, Count III is a breach of contract claim against Redwood Capital Finance Co., LLC ("Redwood"), and Redwood is also named as a defendant in Count VI. These claims are addressed in a separate motion to dismiss filed on behalf of Redwood.

LPA. GRMD's claims against the Private Defendants should therefore be dismissed for lack of subject matter jurisdiction under C.R.C.P. 12(b)(1).

Additionally, the Amended Complaint fails to state any claim for relief against any of the Private Defendants and dismissal is warranted under C.R.C.P. 12(b)(5). First, the pleaded facts prove that, as a matter of law, the foreclosure of the Leased Premises extinguished the LPA before any of the Private Defendants acquired title. Thus, none of those parties can possibly be liable for any breach of that agreement. Second, the individual claims do not state grounds for relief. GRMD's breach of contract claims against Gray Jay, Granby Prentice and GR Terra are defeated by the plain language of the cited provisions of the LPA. The tortious interference claim is defective because, under Colorado law, a party to a contract cannot tortiously interfere with its own contract. GRMD's claim for breach of the covenant of good faith and fair dealing fails because the law will not imply a covenant that contradicts the terms of the contract. Finally, GRMD's declaratory judgment claim incorrectly presumes that the LPA is an installment land contract; and, in any event, the Colorado statutes confirm that the non-judicial foreclosure of the senior deed of trust extinguished the LPA.

GRMD has amended its complaint twice now to include additional parties and a slew of immaterial facts relating to mostly-terminated contracts in an attempt to fix its defective claims. Its latest effort proves that these defects cannot be remedied. As set forth herein, and in the Motion to Dismiss filed contemporaneously herewith by Headwaters, GRMD is attempting to manufacture contractual obligations that do not exist under contracts it has no right to enforce. The facts alleged and documents relied upon in the Amended Complaint deprive GRMD of any

claim against these defendants as a matter of law, and the subject claims should be dismissed with prejudice.

LEGAL STANDARD

"Standing is a threshold jurisdictional question that must be determined before a case may be decided on the merits." *Defend Colo. v. Polis*, 2021 COA 8, ¶ 52. To establish standing, a plaintiff must prove (1) that it "suffered an injury-in-fact"[3] and (2) that the "injury was to a legally protected interest." *Hickenlooper v. Freedom from Religion Found. Inc.*, 338 P.3d 1002, 1006 (Colo. 2014) (emphasis omitted). Lack of standing deprives the court of 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; *Hansen v. Barron's Oilfield Serv*., 2018 COA 132, ¶ 7 (quoting *Sandstrom v. Solen*, 2016 COA 29, ¶ 14).

GRMD has the burden of proving the court's subject matter jurisdiction. *Medina v. State*, 35 P.3d 443, 452 (Colo. 2001). The court may make factual findings related to subject matter jurisdiction, and "need not treat the facts alleged by the non-moving party as true as it would under C.R.C.P. 12(b)(5)." *Id.* In fact, the court has discretion to weigh the evidence, including any affidavits or other documents, as necessary to resolve disputed jurisdictional facts. *Id.*

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 claim should be dismissed 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

[3] In considering the first element, some courts accept as true the allegations in the complaint, but also consider other evidence relevant to standing. *See, e.g.*, *Am. Family Mut. Ins. Co. v. Am. Nat'l Prop. & Cas. Co.*, 370 P.3d 319, 325 (Colo. App. 2015).

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. Moreover, the court may review documents attached to our referenced in the complaint without converting the 12(b)(5) motion into a motion for summary judgment. *Yadon v. Lowry*, 126 P.3d 332, 336 (Colo. App. 2005). *City of Boulder v. Pub. Serv. Co. of Colo*., 996 P.2d 198, 203 (Colo. App. 1999).

RELEVANT FACTS[4]

Development Begins at Granby Ranch and Special Districts are Formed to Assist

1. Granby Realty Holdings LLC ("GRH") was the private developer of Granby Ranch; at the time the Town of Granby ("Town") adopted service plans relating to the proposed development, GRH (then known as SolVista) owned the property that was the site of the proposed residential development, golf and ski resort, and related amenities. Amended Complaint Ex. 6, and ¶¶ 11, 33-35.

2. In 2005, GRH obtained financing for the development from Redwood. *Id.* ¶ 33. GRH granted Redwood a deed of trust to secure repayment of that debt (the "Deed of Trust").

[4] For purposes of the Court's review under C.R.C.P. 12(b)(5) only, the Private Defendants treat Plaintiff's allegations in the light most favorable to it, although such is not required under C.R.C.P. 12(b)(1). Private Defendants reserve the right to challenge any of the alleged facts.

Id. The Deed of Trust was recorded with the Grand County Clerk and Recorder on June 2, 2005. *Id.* at Ex. 6, § 13.

3. To facilitate the construction and ongoing maintenance of the development, GRH sought the organization of a number of special taxation districts, including Headwaters—intended from the start as a developer-controlled district primarily covering certain non-residential portions of the development; and GRMD—which covers residential properties and has a homeowner-controlled board. Amended Complaint, ¶¶ 8-10, 14.

4. Pursuant to the Master Intergovernmental Agreement ("Master IGA") between Headwaters and GRMD, attached to the Service Plan for Headwaters adopted by the Town in 2003 and terminated in 2016, Headwaters was designed to be controlled by the developer, and its successors, and was the "Service District" established to manage and control the financing of infrastructure, budget monies for public purposes, construct and finance infrastructure, and establish necessary service charges and development fees for the "Taxing District." Am. Compl. ¶¶ 11, 14, Exhibits 1 & 2, ¶ 5 and Exhibit F thereto.

5. Until 2016, GRMD, together with Granby Ranch Metropolitan Districts Nos. 2-8,[5] was the "Taxing District," charged with imposition of the required mill levy to pay debt obligations of the districts (including Headwaters) and fund Headwaters' administrative and operating expenses. Am. Compl. ¶¶ 10, 14 -15, Exhibits 1 & 2, ¶ 5 and Exhibit F thereto.

The Amenity Fee Agreement and Resolution

6. Headwaters and GRMD approved a Joint Resolution to Establish an Amenity Fee, effective May 26, 2005 ("2005 Fee Resolution"), imposing a one-time amenity fee upon the

[5] Granby Ranch Metropolitan Districts Nos. 2-8 are separate and distinct districts from GRMD.

approximately 7 acres of property then within Headwaters and the approximately 3,563 acres of property then within GRMD s to be paid to Headwaters upon the transfer of a lot or residential unit. The fee was imposed for the purpose of financing the acquisition, leasing, construction, and replacement of amenities, including the issuance of bonds. Am. Compl., Ex. 4, ¶¶ 1, 6.

7. Under the 2005 Joint Resolution, each residential dwelling unit for which an Amenity Fee has been paid was entitled to certain priority access to amenities and discounts for use of the Amenities as set forth therein. Am. Compl., Ex. 4, ¶¶ 1, 6.

8. Separate and apart from the 2005 Resolution, on June 1, 2005, Headwaters entered an Amenity Fee Agreement with GRH relating to the imposition of an amenity fee to be collected by Headwaters at the rate of $10,000 per residential dwelling unit on a one-time basis with respect to each lot or parcel of land within *all* of the approximately 4,937 acres of property then owned by GRH, including the approximately 3,563 acres of property then within the boundaries of GRMD ("2005 Fee Agreement"). The 2005 Fee Agreement is referenced in the Amended Complaint and relied upon as a ground for relief in Count VII, Am. Compl., ¶¶ 10, 23 n.3, 83, Exs. 1 and 2 and a copy is attached to the Motion to Dismiss filed by Headwaters and referred to herein as Exhibit 9.

9. The stated purpose of the fee was the acquisition, financing, leasing, construction, replacement, operation, maintenance and repair of the certain improvements benefiting the property owned by GRH, including the golf course, ski area, and other recreational improvements, referred to therein as the "Amenities" Ex. 9, at Recital E.

10. Pursuant to the 2005 Fee Agreement, GRH agreed to subject *all of its property* to the amenity fees and granted certain minimum use and enjoyment of the Amenities to subsequent owners and purchasers of homes in the development. Ex. 9.

11. The 2005 Fee Agreement provides that "[n]othing contained herein obligates the Developer to convey, lease, or otherwise contract for any specific Amenities." Ex. 9, at Recital C.

12. GRMD was not a party to the 2005 Fee Agreement. The 2005 Fee Agreement inured to the benefit of the parties thereto and their success and assigns, and it did not identify any third-party beneficiaries. Ex. 9, at ¶ 15(j).

The Granby IGA

13. On February 26, 2008, GRMD, Headwaters, the Town of Granby, and the Granby Ranch Metropolitan Districts Nos. 2-8 entered into an intergovernmental agreement ("Granby IGA"). Am. Compl., ¶ 18; *see also id*., Ex. 5.

14. The Granby IGA provided that Headwaters, Plaintiff, and the Granby Ranch Metropolitan Districts Nos. 2-8 "will be authorized to acquire, construct, own, operate and maintain the ski area and lifts, ski lodge, golf courses . . . . collectively called the 'Amenities.'" Am. Compl., Ex. 5, ¶ 5(a) (emphasis added). That agreement acknowledged that the Amenities are not required to be dedicated or conveyed by the Developer for public use, authorized the imposition of an amenities fee upon dwelling units in the District to defray the costs of "acquisition, construction and installation of the Amenities," and provided Granby residents with preferred access and discounts to the Amenities. Am. Compl., Ex. 5, ¶ 5(b) – (f).

Headwaters Leases the Amenities from GRH.

15. On December 31, 2012, GRH as "Landlord" and Headwaters as "Tenant" entered into the LPA for the stated purpose of giving Headwaters the right to use and an option to acquire a portion of the Granby Ranch development, including the ski area and golf course and improvements located thereon (as defined in the LPA, the "Leased Premises"). *Id*., Ex. 6, at §§ 1.a., 2. GRMD was not a party to the LPA. *Id*., Ex. 6.

16. The ski area and golf area portions of the Leases Premises are referred to in the LPA (and herein) as the "Amenities," (*Id*. at Recitals, ¶ C), and the LPA provides that "[t]he Amenities are expected to entirely or largely be the same as the Leased Premises." *Id.* at § 1.b.

17. The initial term of the LPA was one year, which would automatically renew for an additional 49 one-year terms unless Headwaters stopped appropriating rent in its budget or terminated for other reasons set forth in the LPA. *Id.* § 2.

18. The LPA granted Headwaters the right to acquire the Leased Premises (including the Amenities) during the term of the lease upon payment of the purchase price and compliance with the other terms and conditions provided for in the LPA. *Id.* § 23. Otherwise, Section 23 states that Headwaters would acquire the Leased Premises on December 31, 2062 if the Lease was not terminated before that date. *Id.*

19. For the life of the LPA, GRH remained responsible for the payment of utilities, taxes, costs of certain insurance, and maintenance, and GRH retained fee title to the Leased Premises, including improvements. *Id.* §§ 5-6, 8.a.

20. Annual rent under the LPA consisted solely of all Amenity Fees collected by Headwaters each year under the 2005 Fee Agreement and another 2005 fee agreement with a

different property owner. *Id.* at § 3 a-c. Those "Rental Payments" were to be collected by Headwaters and in turn remitted to GRH. *Id.* § 3.a.

21. There was no set amount of rent because, as the parties acknowledged in the LPA, "the amount of Amenity Fees received by the Tenant may fluctuate greatly from month to month and year to year." *Id*. at § 3.b.

22. Headwaters did not retain any Amenity Fees to fund operation of the Amenities or other district expenses. *Id.* § 3.a. Nor was Headwaters required to remit a minimum amount of Amenity Fees per year; rather, the LPA was not to be construed as indebtedness of Headwaters or a pledge of Headwaters' credit. *Id.* § 3.a, c.

23. All Rental Payments Headwaters made to GRH under the LPA were "absolute and unconditional in all events" and not subject to recoupment, counterclaims, or other defenses. *Id.* § 3.a.

24. The LPA had multiple termination provisions. Termination was automatic upon the earliest of (a) a decision by Headwaters' board not to appropriate funds for Rental Payments at any time during the term, (b) default by Headwaters and GRH's election to terminate, (c) the collection of all possible Amenity Fees from lot sales, (d) the payment of the purchase price by Headwaters, or (e) December 31, 2062. *Id.* § 2. In addition, the LPA provided that "if Tenant ever ceases to operate the Amenities on the Leased Premises for 30 days or longer, . . . Landlord may, in its sole discretion and after at least 10 days advance notice to Tenant . . . elect to terminate this Lease . . . ." *Id.* § 10.

25. The LPA contained a merger/integration provision stating that:

> 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 (c).

26. The LPA granted the Landlord and Headwaters the right to modify the LPA in writing at any time, (*Id*. § 28 (e)), and no party other than GRH and Headwaters had any right to notices under the LPA, including notices of default or termination. *Id.* at § 20.

27. Section 28(f) of the LPA provided:

> This instrument shall also bind and benefit, as the case may require, the heirs, legal representatives, assigns and successors of the respective Parties.

Id. at § 28(f) (emphasis added).

GRH and Headwaters Amend The Fee Agreement

28. In July of 2013, GRH and Headwaters entered into an Amended and Restated Amenity Fee Agreement ("2013 Fee Agreement") that superseded and replaced the 2005 Fee Agreement. *See* Exhibit 10 to Headwaters' Motion to Dismiss. In that agreement, GRH again agreed to subject *all of its property*, which included the property within the GRMD boundaries, to the one-time $10,000 amenity fee payable as set forth therein.

29. The 2013 Fee Agreement affirmed the one-time amenity fee to be collected by Headwaters and affirmed the rights of eligible property owners to priority access to the Amenities as determined by Headwaters from time to time in its sole and absolute discretion. Exhibit 11, §§ 2-3. The 2013 Fee Agreement again provided that the developer had no obligation to convey, lease, or otherwise contract for any specific Amenities, Ex. 10, Recital C, and it stated that this agreement "creates no third-party beneficiary rights in favor of any person not a Party to this Agreement unless the Parties mutually agree otherwise in writing, except that Granby Ranch

Metropolitan District Nos. 3-7 shall be a third party beneficiary if any of the Property is included within its respective boundaries." *Id*., at § 21(d).

30. Separately and independently, in July of 2013, Headwaters and GRMD passed an Amended and Restated Joint Resolution to establish an amenity fee ("2013 Fee Resolution.") continuing the amenity fee to be paid to Headwaters and imposed on the approximately 7 acres of property then within Headwaters and the approximately 813 acres of property then within GRMD.[6] *See* Exhibit 11 attached to Headwaters' Motion to Dismiss.

GRMD and Headwaters Agree to Termination of the Master IGA

31. Effective November 8, 2016, the Master IGA was terminated pursuant to the Termination of Intergovernmental Agreement ("Master IGA Termination"), attached to the Amended Complaint. *Id.* at ¶ 31; *see also id*., Ex. 8, §§ 1-3; Resp. to Mot. To Dismiss, pp. 8-9 (conceding agreement "terminate[d] the prior master IGAs").

32. The Master IGA Termination provided that "the Parties intend for certain of the Granby Ranch Districts, specifically GRMD, to operate independently from Headwaters," and that "[d]ue to the amended service plans and the intention of certain of the Parties to operate independently from each other, there is no further need for the Master IGAs." Am. Compl., Ex. 8, Recitals ¶ F & H (emphasis supplied).

33. The Master IGA Termination further provided that Headwaters, GRMD, and Granby Ranch Metropolitan Districts Nos. 2-8 have "fully satisfied their obligations under the

[6] GRMD passed a resolution on December 16, 2005 amending its boundaries to exclude 2750 acres, leaving 813 acres in GRMD. *See* Exhibit 12 to Headwaters' Motion to Dismiss.

Master IGAs" and those districts waived any right to pursue claims and damages against each other. *Id.* at §§ 4-5.

GRMD and Headwaters Enter Into the Second Granby IGA.

34. On November 8, 2016, the Town, Headwaters, GRMD, and the Granby Ranch Metropolitan Districts Nos. 2-8 entered into an Amended and Restated Intergovernmental Agreement (the "Second Granby IGA"), Am. Compl., ¶ 30 (emphasis omitted); see also id., Ex. 7, ¶ 1.

35. The parties stipulated that the Second Granby IGA "constitutes the entire agreement among the Parties and supersedes all prior written or oral agreements, negotiations, or representations and understandings of the Parties with respect to the subject matter contained herein." Id. at § 16.

36. The Second Granby IGA acknowledges the potential authority of Headwaters, GRMD, and the Granby Metropolitan Districts Nos. 2-8 to acquire the Amenities. Am. Compl., ¶ 30; id., Ex. 7, ¶ 5(a). It affirms that the Amenities are not required to be dedicated or conveyed by the Developer for public use, authorizes the imposition of an amenities fee upon dwelling units in the District to defray the costs of "acquisition, construction and installation of the Amenities," and provides Granby residents with preferred access and discounts to the Amenities. Am. Compl., Ex. 7, §§ 5(b) – (f).

37. The parties further stipulated that the Second Granby IGA "is not intended to, and shall not be deemed to confer any rights upon any persons or entities not named as parties, nor to limit in any ways the powers and responsibilities of the Town, the Districts, or any other entity not a party hereto." Id. at § 20.

GRH's Difficulties Result in Foreclosure.

38. Eventually, GRH defaulted on its obligations under the Deed of Trust. Am. Compl. ¶ 34. In January 2020, the court appointed a receiver over the property subject to the Deed of Trust, including the Leased Premises.[7]

39. After the State of Colorado closed all ski areas in connection with the COVID-19 pandemic, GRA separately announced it would cease operations of the Amenities prior to the expiration of its contract. *Id.* ¶¶ 44-45.

40. In the spring of 2020, Granby Prentice, then holder of the Deed of Trust, initiated nonjudicial foreclosure proceedings pursuant to C.R.S. § 38-38-101, *et seq.* *Id.* ¶¶ 33-35. Following issuance of an order authorizing sale and the August 14, 2020 sale by the Public Trustee,[8] Granby Prentice submitted the highest bid and was issued a Certificate of Purchase for the property. *Id.* Granby Prentice then assigned the Certificate of Purchase to Gray Jay. *Id.*

41. Pursuant to C.R.S. § 38-38-501, on or about August 31, 2020, Gray Jay, as holder of the Certificate of Purchase upon expiration of all redemption periods, took title to Granby Ranch, including the Leased Premises. *Id.* Gray Jay did not succeed GRH as Landlord under the LPA because, by operation of law, the foreclosure proceeding extinguished the LPA, which GRMD disputes. *Id.* ¶ 35.

42. Following the foreclosure, Gray Jay and its affiliates secured and funded the services of new contractors to operate the golf course, ski area, and other facilities. *Id.* ¶ 44.

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[7] *Granby Prentice, LLC v. Granby Realty Holdings LLC*, Case No. 2020CV30003 (Dist. Ct., Grand Cty., Colo.).

[8] *In re Application of Granby Prentice, LLC*, Case No. 2020CV30024 (Dist. Ct., Grand Cty., Colo.).

43. On May 5, 2021, GR Terra purchased the development from Gray Jay. *Id.*, ¶ 47.

ARGUMENT

I. GRMD Lacks Standing to Assert Claims against the Private Defendants.

All GRMD's claims against the Private Defendants (Counts, I, IV – VIII) fail for lack of subject matter jurisdiction because GRMD, a non-party to the LPA, lacks standing to seek enforcement of that contract. As Headwaters asserts in its Motion to Dismiss, neither the plain language of the LPA nor the surrounding circumstances establish that Headwaters and GRH intended to make GRMD a third-party beneficiary of that contract.

Under Colorado law, a non-party lacks standing to enforce a contract unless the non-party can establish it is a direct third-party beneficiary of the contract. *See Bear Creek Dev. Corp. v. Genesee Found.*, 919 P.2d 948, 952 (Colo. App. 1996) ("incidental third-party beneficiary to the option contract . . . lacks standing to exercise the option"); *Frisone v. Deane Auto. Ctr.*, 942 P.2d 1215, 1217 (Colo. App. 1996) (affirming dismissal of breach of contract claim for lack of standing). Direct third-party beneficiaries are created only if the contracting parties intend "to confer a benefit on the third party when contracting." *Everett v. Dickinson & Co. Inc.*, 929 P.2d 10, 12 (Colo. App. 1996). The benefit must be direct, not merely incidental. *Harwig v. Downey*, 56 P.3d 1220, 1221 (Colo. App. 2002). "[I]it is not enough that some benefit incidental to the performance of the contract may accrue to the third party." *Everett*, 929 P.2d at 12. The intent of the contracting parties controls and "must be apparent from the construction of the contract in light of all surrounding circumstances." *Id.*; *see also Harwig*, 56 P.3d at 1221 ("intent must be apparent from the terms of the agreement, the surrounding circumstances, or both").

Courts begin, and often end, their analysis with the terms of the contract. The "'critical fact' that determines whether a non-signatory is a third-party beneficiary is whether the underlying agreement 'manifest[s] an intent to confer *specific legal rights* upon [the nonsignatory].'" *N.A. Rugby Union LLC v. United States Rugby Football Union*, 442 P.3d 859, 865-66 (Colo. 2019) (emphasis and alterations in original). If the provisions the plaintiff identifies do not indicate a clear intent to directly benefit a third party, the claim fails. *See State Farm Fire & Cas. Co. v. Nikitow,* 924 P.2d 1084, 1088 (Colo. App. 1995) (rejecting third-party beneficiary standing for a patient pursuing claims under a chiropractor employment agreement because "no provisions in the instrument … indicate an intent to provide a direct benefit to the patient"); *Quigley v. Jobe*, 851 P.2d 236, 238-39 (Colo. App. 1992). Interpretation of a contract to determine the signatories' intent in this regard is a question of law. *Harwig*, 56 P.3d at 1221.

GRMD is not a party to the LPA or either Amenity Fee Agreement. It does not even try to assert third-party beneficiary status with respect to the latter agreements, so any claim to enforce same must be dismissed outright. Moreover, any attempt by GRMD to assert such status is easily defeated by the plain language of the 2013 Fee Agreement, which expressly limits third-party beneficiaries to Granby Ranch Districts 3-7, separate and distinct entities from GRMD. Ex. 10, ¶ 21(d)

While GRMD asserts that it is a third-party beneficiary of the LPA with a right to recover Amenities Fees paid as rent thereunder, Am. Compl., ¶¶ 25, 42, the Complaint fails to allege which provision(s) of the LPA allegedly confer a direct benefit on GRMD. That, by itself, is a sufficient reason to conclude that GRMD has failed to establish standing. *See Medina*, 35 P.3d at 452. Moreover, the plain terms of the LPA establish that it does not grant GRMD any

enforceable rights or "equity" in the rent paid by Headwaters. Headwaters, not GRMD, collected the Amenity Fee, remitted the rent to the Landlord, and had the *option* to pay the purchase price and acquire the Leased Premises under the conditions in the LPA. Am. Compl., Ex. 1 § 3.*Id.* § 23. The LPA does not mention of GRMD, or even Headwaters for that matter, ever paying "equity" to anyone under the LPA. *See Stauffer v. Stegemann*, 165 P.3d 713, 716 (Colo. App. 2006) ("[A] trial court is not required to accept legal conclusions or factual claims at variance with the express terms of documents attached to the complaint."). To the contrary, the LPA contemplated that it could be terminated prior to the end of the term—either for Headwaters' default or upon Headwaters' decision at any time not to approve rental payments to Landlord—cutting off Headwaters' right to acquire the Leased Premises regardless of any rental payments already made. Am. Compl., Ex. 1 § 2.

Second, the LPA expressly stated that the rent payments would never be returned to Headwaters (let alone GRMD), even if the LPA terminated:

> Tenant shall pay as rent for the Original Term and all of the Renewal Terms of this Lease, upon receipt, an amount equal to the proceeds of all Amenity Fees collected by Tenant (the "**Rental Payments**"). Except as specifically provided herein, *the Rental Payments will be absolute and unconditional in all events and will not be subject to any set-off, defense, counterclaim or recoupment for any reason whatsoever*.

Id. § 3.a (emphasis added). If Headwaters—an actual party to the LPA—had no right to recover the Amenity Fees paid as rent, then GRMD cannot possibly have such rights. *See Parker v. Ctr. for Creative Leadership*, 15 P.3d 297, 298-99 (Colo. App. 2000) (requiring that third-party beneficiary accept the contract's benefits *and* burdens). *See United Steelworkers of Am. v. Rawson*, 495 U.S. 362, 375 (1990) ("third-party beneficiaries generally have no greater rights in a contract than does the promisee").

Other terms of the LPA confirmed that the parties had no intent to create any third-party beneficiaries. Section 28(f) stated that the LPA shall bind "and benefit" the parties thereto and their successors, and § 28(e) granted the Landlord and Headwaters the right to modify the Agreement (in writing) at any time. Not only that, but GRH and Headwaters made clear that the LPA was the "entire" agreement of the parties as it related to the Leased Premises—*i.e.*, that they had no agreements not expressly stated in the LPA. *Id.* § 28.e. No party other than GRH and Headwaters had any right to notices under the LPA, including notices of default or termination. *Id.* at ¶ 20. No provision of the LPA manifests an intent to confer specific legal rights on GRMD. *See N.A. Rugby Union*, 442 P.3d at 865-66.

Because the LPA does not support its claim, GRMD makes the conclusory assertion that it is a third-party beneficiary because it was authorized to impose the Amenity Fee that was used to finance the purchase, that it was authorized under the Granby IGA to make the purchase along with the other Districts, and that its boundaries contain the majority of the "taxpayers, residents, occupants, visitors and invitees." Am. Compl., ¶ 25. GRMD's vague allegations do not establish its standing to enforce the LPA.

First, the Fee Agreements and Resolutions are separate instruments from the LPA (and each other), with separate sets of parties. While GRH and Headwaters were aware of the 2005 Fee Agreement, they elected not to incorporate it into the LPA or designate GRMD as a third-party beneficiary. Am. Compl., Ex. 1 Recitals & § 28.e. *See Midcities Metro. Dist. No. 1 v. U.S. Bank Nat'l Ass'n*, 44 F. Supp. 3d 1062, 1070 (D. Colo. 2014) (ruling that metro district's status as successor grantor and beneficiary under deed did not confer third-party beneficiary status as to separate purchase agreement between successor grantee and purchaser).

Second, pursuant to the 2005 Fee Resolution, GRMD agreed that *Headwaters*, *not GRMD*, would collect the Amenity Fees and authorized *Headwaters, not GRMD,* to use those fees for the purpose of financing the acquisition, leasing, construction and replacement of Amenities." Am. Compl., Ex. 4, ¶¶ 10-11. In that Resolution, GRMD specifically acknowledged that the fees should be used in this manner "[u]ntil such time as the purchase price for the Amenities to be purchased by Headwaters pursuant to the Lease Purchase Agreement between Developer and Headwaters has been paid in full …." *Id*. at ¶ 6. The 2005 Resolution granted GRMD no right to recoup any fees collected thereunder.[9]

As set forth above, neither the 2005 Fee Resolution, Granby Ranch IGA, Second Granby IGA – nor any of the related documents – purport to give GRMD an enforceable right to acquire the Amenities. They could not do so because GRH, the owner of the Amenities until completion of the foreclosure, was not a party to those intergovernmental agreements. And GRH's and Headwaters' intent is the only thing that matters when determining GRMD's third party beneficiary status under the LPA. *See Everett*, 929 P.2d at 12. Those parties specifically provided in both the 2005 and 2013 Fee Agreements that the Developer was not obligated to convey, lease, or otherwise contract for any specific Amenities." Exs. 9 & 10, at Recital C.

Nor do any of these documents state that Headwaters would acquire the Amenities on GRMD's behalf or entitle GRMD to return of the Amenity Fees paid. To the contrary, the 2016

[9] The 2013 Fee Resolution granted Headwaters even more authority with respect to the fees, stating that the "Amenity Fee may be increased from time to time by Headwaters in its sole and absolute discretion." Ex. 11, ¶ 7. Similarly, it allows Headwaters to change the property owners' priority access to certain of the Amenities "in its sole and absolute discretion." *Id*. at ¶ 2.

Termination Agreement acknowledges the intent of Headwaters and GRMD that those entities would thereafter "operate independently from" each other.

The Granby Ranch IGA and Second Granby Ranch IGA simply acknowledge that one or more of the Districts will be authorized to acquire the Amenities. That authorization was memorialized in the LPA, which granted Headwaters and Headwaters alone the right to exercise the option to purchase the Amenities and confirmed that any and all Amenity Fees paid under the LPA as Rental Payments were "absolute and unconditional" and not subject to "set-off, defense, counterclaim or recoupment for any reason whatsoever." Am. Compl., Ex. 1 § 3.a.

Neither the terms of the LPA nor any surrounding circumstances indicate that GRH and Headwaters intended to confer a direct benefit on GRMD, period. GRMD lacks standing to seek to enforce the LPA, and all claims against the Private Defendants should be dismissed for lack of subject matter jurisdiction under C.R.C.P.12(b)(1).

II. GRMD Fails to State a Claim for Breach of Contract Against Gray Jay (Count I) or GR Terra (Count V).

Count I alleges that Gray Jay is bound by the terms of the LPA, including §§ 13 & 26, and breached the LPA because, "assuming that the Subordination, Non-Disturbance, and Attornment Agreement referenced in Section 13 of the LPA was executed and delivered, as described in the LPA, Gray Jay Ventures was obligated to act as Landlord and accept the purchase provisions of Section 23." Am. Compl. ¶ 49. Count V similarly asserts that GR Terra, which purchased the property from Gray Jay, is subject to §§ 13 and 26 of the LPA and "has refused to act as landlord and to accept the purchase provisions of Section 23." *Id* ¶ 70. Even if GRMD had standing, both claims fail as a matter of law for several reasons.

First, the claim that Gray Jay and GR Terra were obligated to act as Landlord and accept the purchase provisions of Section 23 is are based upon an *assumption* that a condition precedent was satisfied, rather than pleading actual occurrence of a condition precedent as required under C.R.C.P. 9. Section 13 of the LPA provides that, in conjunction with the prior lease, "Landlord shall cause to be delivered to Tenant" a subordination, nondisturbance, and attornment agreement. Ex. 6, § 13(b). Instead of plainly stating that GRH delivered such an agreement executed by the required parties, GRMD simply premises its claim upon an "assumption" that this condition occurred. GRMD thus fails to plead that a condition precedent to the alleged liability has been met, in violation of C.R.C.P 9.

GRMD's reliance on § 26 of the LPA is similarly misplaced. That section simply states, in relevant part:

> *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 . . ..

Am. Compl. Ex. 6 § 26 (emphasis added). The Amended Complaint does not, however, allege that GRH or any successor Landlord ever requested that Headwaters subordinate Headwaters' interest under the LPA. And there would not have been any reason to do so since the LPA was already junior to the Deed of Trust.

GRMD acknowledges that both Gray Jay and GR Terra acquired title to the Leased Premises *after* the foreclosure. Am. Compl. ¶¶ 36, 47. As set forth more fully in response to Count VIII below, GRMD's sole challenge to the validity of the foreclosure fails as a matter of law. Thus, because the LPA was recorded after the Deed of Trust and because there are no facts to prove that any attornment agreement was ever properly executed and recorded as necessary to

bind subsequent owners, the LPA was extinguished pursuant to C.R.S. § 38-38-501 via foreclosure before Gray Jay acquired title to the Leases Premises. Accordingly, neither Gray Jay nor GR Terra could have been obligated to "accept" the purchase price under the LPA or to recognize Headwater's alleged right to purchase.

Moreover, GRMD has pleaded no facts to support its conclusory statement that Gray Jay or GR Terra breached the LPA. The only claimed breach by these parties is the allegation that they have "refused to accept the purchase provisions of Section 23." Am. Compl., ¶ 50, 70. The Amended Complaint is devoid of any factual allegation that Headwaters ever tried to exercise its option to purchase the Property or tendered the purchase price set forth in the LPA, assuming it survived the foreclosure. Absent those facts, the conclusory statement that these entities refused to accept the purchase price cannot support a claim for breach of the LPA.

Finally, GRMD has alleged no grounds for a claim of monetary damages against Gray Jay or GR Terra. Even if GRMD had standing to enforce the LPA and the LPA survived the foreclosure, GRMD has pleaded no ground for recovery of damages based upon its alleged equity in the Leased Premises. The relevant contracts defeat any such claim as a matter of law.

And as set forth in Headwaters' Motion to Dismiss, pursuant to the resolution approved by Headwaters and GRMD, Headwaters collected the amenities fees and used those fees to lease the Amenities, with an option to purchase. Even if the LPA continues to exist, it is up to Headwaters and Headwaters alone to decide whether it wants to exercise the option to purchase during the remaining term or whether, at any time prior to the end of the lease term in 2062, it wants to terminate the LPA by declining to appropriate funds to pay the rental. In the event of such termination, the LPA precludes any recoupment of Rental Payments by Headwaters. Am.

Compl. Ex. 6 § 3.a ("Rental Payments will be absolute and unconditional in all events and will not be subject to any set-off, defense, counterclaim or recoupment for any reason whatsoever").

Under these circumstances, GRMD – which did not collect or pay the Amenities Fees to the Landlord – clearly has no claim against Headwaters, much less the successive owners of the Leased Premises, for the Amenity Fees paid by Headwaters as Rental Payments. Nor does it have any "equity" in the property it can recover through a breach of contract action.

For all these reasons, Counts I and V should be dismissed against these defendants, with prejudice.

III. GRMD Fails to State a Claim For Breach of Contract Against Granby Prentice (Count IV).

Count IV asserts that Granby Prentice breached the LPA. For the same reasons as Counts I and V, Count IV must be dismissed. Count IV fails for at least two additional reasons.

In order to plead a breach of contract claim, GRMD must establish (1) the existence of a contract between defendant and plaintiff, (2) performance by the plaintiff, (3) breach of the contract, and (4) damages. *See Horton v. Bischof & Coffman Constr., LLC*, 217 P.3d 1262, 1271-72 (Colo. App. 2009).

GRMD fails to allege facts establishing the first element – that Granby Prentice was ever a party to or otherwise bound by the LPA. GRMD does not and cannot allege that Granby Prentice was a signatory to the LPA. *See* Am. Compl. Ex. 6. Instead, GRMD's sole theory is that the party that took title to the Leased Premises through the foreclosure became bound by the LPA. Am. Compl. ¶ 6 ("Following the foreclosure, Gray Jay Ventures became the successor in interest to the LPA and was bound to assume the role of Landlord under the LPA"). But, according to the Amended Complaint, that party is not Granby Prentice, but Gray Jay. *Id.* ¶¶ 36, 33. Indeed, the

Amended Complaint does not allege that Granby Prentice took title to the Leased Premises, nor could it. As GRMD acknowledges, Granby Prentice assigned the Certificate of Purchase to Gray Jay. *Id.* ¶ 35. Pursuant to Colorado statute, the holder of a certificate of purchase takes title *only* once all redemption periods have expired. C.R.S. § 38-38-501. That holder was Gray Jay. Am. Compl. ¶ 36. Thus, even under GRMD's theory that the party taking title to the Leased Premises became bound by the LPA, Count IV fails because GRMD does not allege that Granby Prentice ever took title to the Leased Premises or was otherwise bound by the LPA.

Second, even if Granby Prentice were somehow bound by the LPA, GRMD fails to allege any facts that would give rise to a breach of that agreement. GRMD does not allege that Granby Prentice acted at all post-foreclosure, after title passed to Gray Jay, let alone that it acted to breach the LPA. It does not allege what, if anything Granby Prentice did to "fail[] to recognize the LPA" or what facts give rise to any other claimed breach of the LPA. For all of those reasons, Count IV against Granby Prentice fails as a matter of law.

IV. GRMD's Tortious Interference Claim against Gray Jay and Granby Prentice (Sixth Claim) Fails to Allege Interference with Another's Contract.

Though not entirely clear, Count VI appears to assert that Gray Jay tried to prevent Headwaters from operating the Amenities and tortiously interfered with LPA, causing GRMD to suffer damages as a third-party beneficiary of that agreement. *Id*. at ¶¶ 75-77. This claim is presumably based upon the allegations that in November of 2020, following the foreclosure, Gray Jay notified Headwaters that it was terminating the LPA under § 10 thereof based upon Headwaters' failure to operate the Amenities in accordance with the LPA. Am. Compl. ¶ 40-41. For the same reasons that GRMD lacks standing to enforce the LPA, it lacks standing to bring this claim. *See Lufti v. Brighton Cmty. Hosp*. *Ass'n*, 40 P.3d 51, 58 (Colo. App. 2001); *Hanley v.*

Cont'l Airlines, Inc., 687 F. Supp. 533, 537 (D. Colo. 1988) (recognizing that an intended third-party beneficiary can sue for tortious interference); CJI-Civ 24:1 (Intentional Interference with Contractual Obligations – Elements of Liability). A party who is merely "an incidental beneficiary cannot maintain a claim for tortious interference." *Krynicki v. Penthouse Media Grp., Inc*. *(In re Gen. Media, Inc.)*, 368 B.R. 334, 345 (Bankr. S.D.N.Y. 2007) (collecting cases); *cf. Frisone*, 942 P.2d at ("An incidental beneficiary is not entitled to bring suit on the contract.").

Even assuming that GRMD has standing and that the LPA was not extinguished via foreclosure prior to the alleged interference, GRMD has stated no grounds for relief. Under black letter Colorado law, "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"). Instead, a claim for tortious interference must allege that a defendant, who is "*not a party to the contract*, induces the third party to breach the contract, or interferes with the third party's performance of the contract." *Colo. Nat'l Bank*, 846 P.2d at 170 (emphasis added). "[I]t is the conduct of the third person *who is not a party to the contract* that is punished for inducing a breach or preventing performance of the contract." *Id.*

GRMD does not allege that Gray Jay intentionally interfered with another's contract, but, rather, that Gray Jay interfered with the LPA, its *own contract*. Colorado law does not permit such a claim, *MDM Grp.*, 165 P.3d at 886, and the Amended Complaint does not allege that anyone interfered with the LPA prior to Gray Jay taking title to the Leased Premises.

The Amended Complaint adds Granby Prentice as a defendant to Count VI. To the extent Granby Prentice is a party to the LPA (it is not), this claim fails as to Granby Prentice for

the same reasons. Regardless, GRMD pleads no facts to support a tortious interference claim against Granby Prentice relating to the Section 10 termination or otherwise. Tortious interference requires, among other things, "*action* by the defendant that induced a breach of the contract." Am. Compl. ¶ 74 (emphasis added); *see* CJI-Civ 24:1 (requiring "words or conduct, or both"). As the Amended Complaint acknowledges, Granby Prentice transferred its Certificate of Purchase to Gray Jay before the foreclosure was completed and prior to the Section 10 termination notice or events giving rise to that notice. *See* Am. Compl. ¶¶ 36, 40. GRMD has not alleged any facts establishing that *Granby Prentice* took any action post-foreclosure, let alone any intentional act to interfere with the LPA under Section 10 or otherwise. *Id.* ¶¶ 76-77. For these reasons, the court must dismiss Count VI against Gray Jay and Granby Prentice, with prejudice.

V. GRMD's Breach of Good Faith and Fair Dealing Claim Fails to State a Claim.

Count VII alleges that Gray Jay failed to "uphold its duty of good faith and fair dealing when it refused to act as Landlord under the LPA and honor the right of Headwaters to acquire the Leased Premises on behalf of GRMD." Am. Compl. ¶ 84. Recognizing its inability to identify any contractual provision breached by Gray Jay, GRMD tries to invoke the implied covenant of good faith and fair dealing. Again, even assuming it has standing to enforce the LPA and that the LPA survived foreclosure, Colorado law does not allow GRMD to impose an implied duty that contravenes the plain terms of the contract.

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). 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)). Colorado courts will not imply a duty of good faith and fair dealing that contradicts the terms or conditions for which a party has bargained. *McDonald v. Zions First National Bank*, N.A., 348 P.3d 957, 967 (Colo. App. 2015). "Nor does the duty ... inject substantive terms into the parties' contract." *Id.* (internal quotations omitted). "Rather, it requires only that the parties perform in good faith the obligations imposed by their agreement." *Id*.

Here, GRMD's claim is premised on legal conclusions that, as described above in relation to the breach of contract claims, are not supported by factual allegations or the plain language of the LPA (and other agreements) attached to Amended Complaint.[10] GRMD has not alleged (and cannot) that Gray Jay acted in any specific manner (let alone dishonestly or outside of accepted commercial practices) to thwart or otherwise undermine any attempt by Headwaters to purchase the property under the LPA.

Even if the LPA survived the foreclosure, there is no dispute that the LPA only granted Headwaters an option to purchase the Leases Premises during the term of the lease, which ran until 2062. The Amended Complaint fails to plead that Headwaters ever tried to exercise that option. The duty of good faith cannot impose an obligation on the successor landlords to accept a purchase price that has never been offered or to convey title to a party that has not requested it.

[10] Gray Jay incorporates its responses to the Breach of Contract hereto by reference, as the claim is essentially restated and supported by the same legal conclusions and factual impossibilities.

Such an obligation would contravene the plain terms of the LPA and impose obligations that do not exist in the agreement. For this reason, Count VII should be dismissed against Gray Jay, with prejudice.

VI. GRMD Has Not Stated a Claim for Declaratory Relief Against Gray Jay or GR Terra.

GRMD's final claim, Count VIII, seeks a declaration that that the LPA was not terminated through the foreclosure. The claim is not based upon any alleged deficiency in the foreclosure process, but rather is premised on the legal conclusion that the LPA was actually an "installment land contract" that "could only have been terminated through a judicial foreclosure." Am. Compl. ¶ 89. This claim, like GRMD's others, fails because GRMD lacks standing. Because GRMD is not a party to or an intended third-party beneficiary of the LPA, it cannot seek declaratory relief to reinstate the LPA. *See Farmers Ins. Exch. v. Dist. Ct.*, 862 P.2d 944, 947 (Colo. 1993) (holding that "indirect and incidental pecuniary injury . . . is insufficient to confer standing" for declaratory judgment claim).

In addition, GRMD's declaratory judgment fails as a matter of law. Even assuming for purposes of this Motion that the LPA was an installment land contract (it is not), GRMD's legal conclusion that it survived the foreclosure is defeated by clear Colorado law. Colorado statutes specifically confirm that a non-judicial foreclosure of a senior deed of trust *does* extinguish parties' interests in junior land contracts. Specifically, the non-judicial foreclosure provisions in Article 38 of Title 38 provide that "an installment land contract vendee of property"—i.e. a buyer—"shall be considered an owner . . . and such vendee shall be subject to all requirements in this article with respect to owners." C.R.S. § 38-38-305(3).

Owners, under Article 38's non-judicial foreclosure scheme, are given the right to cure

prior to the foreclosure sale. *Id.* § 38-38-104. If an owner does not cure and the redemption period expires, the holder of a certificate of purchase receives title to the property "free and clear of all liens and encumbrances junior to the lien foreclosed," which would include a junior installment land contract. *See Id.* § 38-38-501. As one Colorado court recognized, the purpose of § 38-38-305 "is to give the vendee the preferential redemption rights that a title owner has under part 3 of article 3, again, for example, as when a senior deed of trust is foreclosed." *Paraguay Place-View Trust v. Gray*, 981 P.2d 681, 683 (Colo. App. 1999).

That is precisely what happened here. The Deed of Trust was senior to the LPA. Am. Compl. ¶¶ 27, 34. Headwaters was, at best, a vendee under the LPA. *See* C.R.S. § 38-38-305(3). Granby Prentice initiated a non-judicial foreclosure proceeding, but Headwaters did not exercise its statutory cure or redemption rights. The Amended Complaint does not allege otherwise. Thus, whatever interest Headwaters had under the LPA was extinguished pursuant to § 38-38-501 because the LPA was junior to the Deed of Trust. *See First Interstate Bank v. Tanktech, Inc.*, 864 P.2d 116, 119 (Colo. 1993) (holding, under prior version of statute, that "upon foreclosure of a senior security interest, any subordinate leases, liens or encumbrances are extinguished once the redemption period has expired"). Gray Jay, as the party holding the Certificate of Purchase upon expiration of the redemption periods, took title to the Leased Premises free and clear of the LPA. *See Paraguay Place*, 981 P.2d at 683. The LPA was extinguished before either Gray Jay or GR Terra acquired title.

Second, although the Court need not reach this issue because the foreclosure extinguished the LPA, the LPA is not an installment land contract as a matter of law. To the extent the Amended Complaint purports to set forth a comprehensive list of the legal requirements for a

land contract, Am. Compl. ¶ 90, the Court need not accept such allegations as true. Colorado law requires, among other things, that the parties to an installment land contract designate the public trustee as an escrow agent for property taxes and that, within 90 days of signing, the seller must file a notice of transfer. C.R.S. § 38-35-126. Neither the LPA nor the Amended Complaint assert that this occurred. While it is true that the LPA gave Headwaters the right to acquire the Leased Premises upon payment of the specified purchase price, the LPA labeled the consideration paid to GRH as "Rental Payments"—not installments payments. Am. Compl. Ex. 6 § 3.a. And, in contrast to an installment land contract, the amount of those payments were not fixed; indeed, the parties to the LPA acknowledged that those payments "may fluctuate greatly from month to month and year to year" and would not operate to confer on Headwaters any equity in the Leased Premises. *Id.* §§ 3.a & b. The parties even acknowledged that the LPA was not a debt of Headwaters. *Id.* § 3.c. Contrary to the Amended Complaint's allegations, the parties agreed that the LPA "shall be a gross lease, with Landlord responsible for any taxes and all costs of insurance and maintenance" as well as payment of utilities. *Id.* §§ 5, 6.a. Thus, under the terms of the LPA and applicable law, the Amended Complaint fails to state a claim that the LPA was an installment land contract that could be extinguished only through a judicial foreclosure.

As a matter of law, conveyance of the Leased Premises to Gray Jay through the non-judicial foreclosure proceedings extinguished the LPA and Count VIII must be dismissed with prejudice.

CONCLUSION

The Court lacks subject matter jurisdiction over GRMD's claims. Additionally, GRMD fails to state claims for breach of contract, tortious interference, breach of covenant of good faith and fair dealing, or declaratory relief. The facts alleged and documents attached to the Amended Complaint establish that these pleading deficiencies cannot be cured. Therefore, this Court must dismiss GRMD's claims against Gray Jay, Granby Prentice, and GR Terra with prejudice.

Dated: July 9, 2021

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CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing **DEFENDANTS GRAY JAY VENTURES LLC, F/K/A GP GRANBY HOLDINGS, LLC, GRANBY PRENTICE LLC, AND GR TERRA LLC'S MOTION TO DISMISS SECOND AMENDED COMPLAINT** was served via the Colorado Courts e-filing system on this 9th day of July 2021, addressed to the following:

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