DISTRICT COURT, GRAND COUNTY, COLORADO Court Address: Grand County Combined Courts 307 Moffat Ave Hot Sulphur Springs, CO 80451 Telephone No.: (970) 725-3357	DATE FILED: July 30, 2021 6:37 PM FILING ID: 1F4579D74B952 CASE NUMBER: 2021CV30008
Plaintiff: GRANBY RANCH METROPOLITAN DISTRICT, a quasi-municipal corporation and political subdivision of the State of Colorado, **v.** **Defendants:** HEADWATERS METROPOLITAN DISTRICT, a quasi-municipal corporation and political subdivision of the State of Colorado; GRAY JAY VENTURES, LLC.; REDWOOD CAPITAL FINANCE CO., LLC; GRANBY PRENTICE, LLC.; GR TERRA, LLC.	**▲COURT USE ONLY▲** Case No.: 2021CV030008 Div.: Rm.:
Counsel for Plaintiff: Charles E. Norton, #10633 Alicia M. Garcia, #53860 NORTON & SMITH, P.C. 600 17th Street, Suite 2150S Denver, Colorado 80202 Phone Number: (303) 292-6400 FAX Number: (303) 292-6401 E-mail: CNorton@NortonSmithLaw.com AGarcia@NortonSmithLaw.com	

PLAINTIFF GRANBY RANCH METROPOLITAN DISTRICT'S RESPONSE IN OPPOSITION TO GRAY JAY VENTURES, LLC, GRANBY PRENTICE, LLC, and GR TERRA, LLC MOTION TO DISMISS THE SECOND AMENDED COMPLAINT PURSUANT TO C.R.C.P. 12(B)(1) & (5)

Plaintiff Granby Ranch Metropolitan District ("GRMD") through its undersigned counsel, submits the following Response in Opposition to Gray Jay Ventures, LLC, Granby Prentice, LLC, And GR Terra, LLC Motion to Dismiss the Seconded Amended Complaint Pursuant to C.R.C.P. 12(b)(1) & (5), and in support thereof states as follows:

INTRODUCTION AND 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"). On June 2, 2021,

GPGH changed its name to Gray Jay Ventures, LLC ("Gray Jay"). Both defendants filed a motion to dismiss, both which were 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 May 20, 2021 GRMD exercised its right under C.R.C.P. 15(a) to file an amended complaint before any responsive pleading had been filed. Subsequently, the original defendants filed a notice with the court stating that the original Complaint was superseded by the Amended Complaint and thus they would not be filing any reply briefs in support of their motion to dismiss. After receiving leave from the court, the Second Amended Complaint was filed on July 6, 2021; its purpose was to include GR Terra as a party (upon its request) and to reflect Gray Jay's name change.

Gray Jay, GR Terra and Granby Prentice (collectively referred to as "Defendants" or "Private Defendants") filed their motion jointly as the private party interests. GR Terra is a Missouri based limited liability company which was formed for the purposes of acquiring the Granby Ranch property, including the Leased Premises. GR Terra purchased the property subject to the LPA from Gray Jay Ventures on or about May 5, 2021.

Before discussing the specific law and facts raised in the motions, it is important to briefly summarize what this case is really about. Headwaters was formed in order to construct, install, and acquire public infrastructure serving the residents of all of the Granby Ranch Districts, including GRMD. The original service plan contemplated that this infrastructure would include the recreational amenities that are the subject of this lawsuit. Headwaters was under the control of the original developer of the SolVista project, which used deeds or options to purchase tiny interests in open space properties and ownership of a condominium unit to qualify its

principals and employees to be the sole voters in Headwaters elections and to sit on the Headwaters Board. Headwaters committed to the Town of Granby and the other Granby Ranch Districts that it would acquire the Amenities which are the subject of this lawsuit on behalf of all of the Granby Ranch Districts and own and operate them on behalf of the residents of the Districts. The Service Plan for Headwaters provided that when that District dissolved, GRMD would own and maintain the infrastructure. The LPA provided that Headwaters would own the Amenities outright at the end of a term of years and could purchase them for nothing more than the aggregate amount of an Amenities Fee that Headwaters and GRMD had agreed to impose.

At some point, the original developer allegedly defaulted on its obligations to the original lender, Redwood. Redwood had agreed to accept the LPA and had signed and delivered an agreement that if it or its successors even came to have the possessory interest in the property it would honor the LPA and assume the role of landlord under it. When Redwood foreclosed on the property, it decided that its commitments were a drag on the purchase price for which it could sell the Amenities to a third party (GR Terra). It assigned its certificate of purchase to an affiliated company, Granby Prentice (now Gray Jay) in order to claim that the LPA had been extinguished by the foreclosure and in order to simply ignore its own contract obligations (and those of Gray Jay and its purchaser, GR Terra). This intricate scheme allowed the Defendants to maximize their return and GR Terra to buy the property free of all obligations to manage it to benefit the residents of the Granby Ranch Districts and the Town of Granby and instead to manage the Amenities entirely to benefit the private property interests of GR Terra. GR Terra has participated in this scheme at the same time that it brazenly sought to assume control of Headwaters and use it as an arm of GR Terra free from all commitments made to Granby and district residents at the time the Town approved the service plan for Headwaters.

Fortunately, the law makes GRMD a third-party beneficiary of the LPA which can enforce it according to its terms. Further, the LPA was not extinguished by the foreclosure, both because the LPA is a covenant running with the land and as an installment land contract should have been foreclosed through the courts. Plaintiff GRMD has also stated a plausible claim for a breach of the covenant of good faith and fair dealing and tortious interference with a contract.

RESPONSE TO STATEMENT OF FACTS

GRMD has presented an extensive factual recitation in its Response to Headwater's Motion to Dismiss. Given the substantial overlap of the two defense motions, GRMD incorporates that Statement fully into this Response. While Gray Jay, GR Terra, and Granby Prentice list 43 factual statements on pages 6 to 16 of their brief, they omit a number of well-pleaded allegations in the Second Amended Complaint that are pertinent to deciding their motions to dismiss. GRMD has supplied those material facts in its Response to Headwaters.

STANDARD OF REVIEW

The Private Defendants discuss the applicable "Legal Standard" on pages 5-6 of their brief. While they do not identify which portions of their motion to dismiss are predicated on C.R.C.P. 12(b)(1) (lack of jurisdiction over the subject matter) and which are based on C.R.C.P. 12(b)(5)(failure to state a claim upon which relief may be granted) it seems clear that the only theory which even arguably qualifies for analysis under 12(b)(1) is the contention that GRMD is not a third-party beneficiary of the LPA and hence lacks standing to maintain this action.

However, the Private Defendants have conflated subject matter jurisdiction with failure to state a claim. In *Ashton Properties, Ltd. v. Overton,* 107 P.3d 1014 (Colo. App. 2004) the Court of Appeals dealt with a trial court ruling that the plaintiff did not exist as a legal entity and thus

did not have the capacity to sue. The district court reasoned that it lacked subject matter jurisdiction and dismissed the complaint both under C.R.C.P. 12(b)(1) and 12(b)(5).

The Court of Appeals reversed, holding that "capacity is a procedural issue concerning the personal qualifications of a party to litigate a case." Capacity to sue is determined without regard to the particular claim or defense being asserted, but instead with regard to the characteristics of a party. Third-party beneficiary status is very similar; it concerns not the merits of the various claims raised by the plaintiff, but instead if it has the legal authority to enforce the contract. If GRMD was an intended third-party beneficiary, it has standing to enforce the terms of the LPA. *E. Meadows Co., LLC v. Greeley Irr. Co.*, 66 P.3d 214, 217 (Colo. App. 2003).

By contrast, a C.R.C.P. 12(b)(1) motion to dismiss for lack of subject matter jurisdiction 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.

For these reasons, the Court of Appeals in *Ashton* held that since the Colorado Constitution vests district courts with general subject matter jurisdiction in civil cases, and as courts of general jurisdiction have the authority to consider questions of law and equity and to award legal and equitable remedies, the district court had subject matter jurisdiction over the plaintiff's claims for breach of contract and of fiduciary duty. *Ashton*, 107 P.3d at 1017. Private

Defendants' motion to dismiss under C.R.C.P. 12(b)(5) should be denied on this basis alone; this Court has subject matter jurisdiction over GRMD's claims.

The cases cited by the Defendants, including *Tabor Found. v. Colo. Dep't of Health Care Policy & Fin.*, 2020 COA 156 fn. 3, and *Hansen v. Barron's Oilfield Serv*., 2018 COA 132, do not deal with third-party beneficiary status under a contract at all. However, if it is assumed for the sake of argument only that they are applicable here, those cases also support the denial of Private Defendant's motion to dismiss. In *Tabor Foundation*, fn. 3, the Court of Appeals noted a "procedural anomaly" in that the issue of taxpayer standing had been resolved on motions for summary judgment. However, the Court of Appeals held that this anomaly did not affect the disposition of the case, since the trial court had essentially followed the procedures outlined in *Trinity Broad. of Denver, Inc. v. City of Westminster*, 848 P.2d 916, 925 (Colo. 1993). *Trinity* requires a full evidentiary hearing with regard to a proper 12(b)(1) motion, where the court sits as the trier of fact and makes the required findings of fact and conclusions of law as to its jurisdiction. *Tabor Foundation*, fn. 3.; *Trinity*, 848 P.2d 925-927.

The Private Defendants demonstrate confusion over this standard when they urge the Court on page 5 of their Motion to "make factual findings related to subject-matter jurisdiction;" to weigh the evidence including any affidavits or other documents, "as necessary to resolve disputed jurisdictional facts;" and not to treat the facts alleged by the non-moving party as true. None of this can be accomplished without an evidentiary hearing, and in fact the case which Private Defendants cite in support of these propositions, *Medina v. State*, 35 P.3d 443 (Colo. 2001), resulted in a reversal, with the Colorado Supreme Court holding that "the trial court should have held an evidentiary hearing pursuant to 12(b)(1) to resolve those factual issues upon which jurisdiction turns, and we remand the case for this purpose." *Id*. at 463. If the issue of

GRMD's third party beneficiary status is really one of subject matter jurisdiction (which it is not), then GRMD respectfully requests a full evidentiary hearing under *Trinity*. [1]

By contrast, 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 has pled a plausible claim to be a third-party beneficiary to the LPA with standing to bring this suit.

[1] In addition, the Colorado Supreme Court has clarified that the parties are permitted to conduct discovery into the jurisdictional issues involved in a *Trinity* hearing, which the Court also explained as being implicated in a 12(b)(1) motion to dismiss for lack of subject matter jurisdiction. In this case, both sides are permitted to conduct discovery regarding the issue of whether or not GRMD was an intended third-party beneficiary of the LPA.

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

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

> The key question is the intent of the parties to the actual contract to confer a benefit on a third party. That intent must appear from the contract itself or be shown by necessary implication. It is a question of fact to be determined by the terms of the contract taken as a whole, construed in the light of the circumstances

> under which it was made and the apparent purpose the parties were trying to accomplish.

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

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

Unlike the situation in *E.B. Roberts*, where third party beneficiary status was found despite the fact that the contract nowhere mentions the third-party, the LPA mentions GRMD expressly in Recital B, which notes that Headwaters had previously adopted, with the Granby Ranch Metropolitan District, a Joint Resolution to Establish an Amenity Fee dated May 26, 2005. Specifically, Recital B. provides that the Joint Resolution imposing the Amenity Fee had been adopted "In order to pay rental payments with respect to the Leased Premises and pay the purchase price of the Leased Premises." GRMD jointly adopted an Amenities Fee with

Headwaters to allow Headwaters to fund the rental payments for the ski area and golf course and eventually to buy them. The reference to GRMD in recital B. alone gives rise to a plausible inference that the acquisition of the Amenities under the LPA 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 Second 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. The Joint Resolution goes on to note that these Amenities will benefit "the property within the Districts." The inference is strong that the intent of the parties was to confer a direct benefit on GRMD through the rental and acquisition of the amenities. The Joint Fee Resolution is expressly identified in the LPA as the source of rental payments under the LPA, and it is part of the provisions of the LPA.

This reference to the Joint Fee Resolution in the LPA negates the Defendant's contentions that GRMD alleges no surrounding facts or circumstances illustrating that the parties intend to afford GRMD the benefits of the above cited LPA provisions. Moreover, it establishes the parties' intent to include the Joint Fee Resolution as part of the LPA. Further, even if the Joint Resolution was not intended to be a part of the LPA (which it was), 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*, 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.

The Defendants also contend that the LPA does not directly benefit GRMD because it was Headwaters that remitted the Rental Payments/Amenity Fee. However, the circumstances surrounding the LPA, including the relationship between GRMD and Headwaters, undercut this contention. Pursuant to the Master IGA between Headwaters and GRMD, which governed the relationship between the parties until 2016 (the LPA was entered into in 2012), Headwaters was to manage and control the financing of infrastructure, and to establish all necessary service charges including "development fees" for GRMD. Amended Complaint, para.14. 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 this supports the contention 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 Second Amended Complaint, para. 15. 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 Second 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 Second Amended Complaint, para. 19. "Districts" was once again a defined term in the Granby Ranch IGA, and included Headwaters, GRMD, and the Granby Ranch Metropolitan Districts.

The Defendants contend that that GRMD is barred from being a third-party beneficiary to the LPA because the LPA bars the right to recover the payments made under it. However, this is irrelevant to the question of whether or not GRMD was an intended third-party beneficiary. It is rare that a purchaser can recover the amount that it has paid of a purchase price for land except in cases of fraud, and GRMD did not seek such restitution. Even if the LPA precluded the right to recover the payments made under the LPA, GRMD has also sustained damages unrelated to the payments, specifically the loss of its option to purchase the Lease Premises under Section 23 and to have the Amenities managed under public ownership. GRMD also contends that it is entitled to the equity that has been built up that is represented by the fair market value of the Amenities less the amount of the lease payments made under the LPA. This is a different remedy than direct restitution of the lease payments, and nothing in the structure of the LPA precludes the claim.

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. Granby Prentice, Gray Jay, and GR Terra breached the LPA when they refused to be bound as Landlord to Headwaters and refused to accept the purchase provisions of Section 23 of the LPA.

The LPA contains a Subordination, Non-Disturbance, and Attornment Agreement in Section 13(b), which provides that,

> [I]n connection with the Prior Lease, Landlord shall cause to be delivered to Tenant a Subordination, Non-Disturbance and Attornment Agreement, to be executed by Redwood Capital Finance Company (the "**Lender**"). Landlord and Tenant hereby acknowledge that, in connection with the execution of this Lease, ***Landlord has delivered to Tenant, an agreement executed by the Lender either subordinating this Lease to the deed of trust held by the Lender but obligating the Lender and any successor thereto to be bound by this Lease and by all of Tenant's rights hereunder*** (to the extent 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.

(emphasis added).

According to Section 26 of the LPA, the Non-Disturbance Agreement shall provide, among other things, that upon such lenders' succession of interest it shall be bound as Landlord to the provisions of the LPA, including Headwater's right to acquire the Leased Premise pursuant to Section 23. Section 23 provides for eventual acquisition of the Leased Premises by the Tenant.

The Private Defendants argue that GRMD is basing its claims on the execution and delivery of a Subordination, Non-Disturbance and Attornment Agreement ("SDNA"). They further contend that there is "no evidence" that an attornment agreement was ever properly executed and recorded. However, there is direct evidence that the Landlord (GRH) gave Headwaters an agreement signed by Redwood Capital ***obligating Redwood Capital and any successor thereto to be bound by the LPA and by all of Tenant's rights under the LPA,***

because that is what the LPA says. It will be interesting to hear why Redwood Capital, Headwaters, and GRH now contend that the statement they made in the LPA that the agreement had already been delivered was false.

a. *The LPA was not terminated via foreclosure and thus Gray Jay and GR Terra remain bound by the purchase price provisions of the LPA.*

GR Terra and Gray Jay argue that GRMD's reliance on the LPA is misplaced because the LPA was extinguished pursuant to C.R.S. 38-38-501 via foreclosure before Gray Jay acquired title to the Leased Premises and thus, 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 the Leased Premises. This argument fails for a number of reasons.

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

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

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

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

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

The LPA is a covenant running with the land. Unlike personal covenants, which operate like a general contract provision and bind only the actual parties to the covenant, real covenants run with the land and burden or benefit successors in interest. *Id.* This includes GPGH. As the Court of Appeals reasoned in *Fisk v. Cathcart*, 3 Colo. App. 374, 33 P. 1004 (1893), what a purchaser who takes property subject to an encumbrance receives is an equity of redemption, which includes the right to enforce covenants which run with the land under antecedent instruments. Under the logic of *Lookout Mountain*, the successor is also subject to the burdens of the covenants. The public trustee foreclosure of the 2005 Redwood Capital Deed of Trust, the issuance of a certificate of purchase to Granby Prentice, and the assignment of that Certificate to GPGH (Second Amended Complaint, para. 35) did nothing to terminate the covenant running with the land created by the LPA.

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

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

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

Secondly, the LPA provides that the Landlord shall lease the property to the tenant and that the lease shall automatically renew for 49 additional one-year terms. *See* LPA sections 1.a. and 2. This satisfies the second element and exhibits a promise of the buyer to make payments over a long period of time. Thirdly, section 13.a. of the LPA provides that upon Tenant keeping and performing the agreements and obligations of the Lease, they shall have the right to acquire the Leased premise in accordance with section 23. Section 23.e provides that upon the closing date, the Landlord will deliver to Tenant a warranty deed for the Leased Premises free and clear of any material lien or encumbrance created by or arising through Landlord . . . ." This satisfies the third element of an installment land contract.

Lastly, section 24.a provides that if the Tenant fails to pay under the LPA or if they breach any other covenants, the Landlord may terminate the lease. Section 3.a of the LPA states that the Rental Payments would never be returned to Headwaters, even if the LPA Terminated.

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

Often times, courts choose to treat an installment land contract as a mortgage and require foreclosure to be done through the courts. The factors to be used by the trial court in determining whether to treat an installment land contract as a mortgage include the amount of the vendee's equity in the property, the length of the default period, the willfulness of the default, whether the vendee has made improvements, and whether the property has been adequately maintained. *Woods v. Monticello Develop Development Co.*, supra; T*erre Grande, Inc. v. Four Corners Oils & Minerals Co.*, 262 F.Supp. 964 (D.Colo.1967).

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

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

b. Granby Prentice was party to the LPA prior to Gray Jay's succession

Granby Prentice argues that GRMD cannot establish an existence of a contract because it cannot prove that Granby Prentice was ever a party to or otherwise bound by the LPA. This is simply not accurate; as section 13(b) recites, Redwood Capital had signed an agreement obligating its successors to be bound by the LPA. Granby Prentice was the assignee of Redwood Capital, and it was fully bound as a successor in interest.

Granby Prentice mistakenly tries to tie its status as a successor to the date it took title to the property under CRS 38-38-501, stating that the holder of a certificate of purchase takes title only once all redemption periods have expired.

Granby Prentice was awarded the Certificate of Purchase of the subject property, including the Leased Premises on or around August 14, 2020. Granby Prentice assigned this Certificate of Purchase to the defendant Gray Jay on or about August 31, 2020. C.R.S. 38-38-501(1) provides, in part,

> Upon the expiration of all redemption periods allowed to all lienors entitled to redeem under part 3 of this article or, if there are no redemption periods, upon the close of the officer's business *day eight business days after the sale*, title to the property sold shall vest in the holder of the certificate of purchase or in the holder of the last certificate of redemption in the case of redemption.

(emphasis added).

In its Motion to Dismiss, Granby Prentice does not set forth what the redemption period in this sale was. Assuming it was the standard eight business days, title would have vested in Granby Prentice on August 26, 2020. Thus, Granby Prentice took title to the Leased Premises and was bound by the LPA up until August 31, 2020 when Gray Jay took title to the property.

III. GRMD properly maintains a claim for Tortious Interference against Gray Jay and Granby Prentice

Under Colorado law, in order to prove there was tortious interference with a contract, the Plaintiff must prove that (1) the plaintiff had a contract; (2) the defendant knew or reasonably should have known of the contract; (3) the defendant by words or conduct, or both, intentionally caused the nonperformance or termination of the contract; (4) the defendant's interference with the contract was improper; and (5) the defendant's interference with the contract caused the plaintiff damages. *Galleria Towers, Inc. v. Crump Warren & Sommer, Inc.*, 831 P.2d 908, 910 (Colo. App. 1991).

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

The defendants contend that GRMD cannot maintain a claim for tortious interference because "a defendant cannot be liable for interference with its own contract." *MDM Grp. Assocs. v. CX Reinsurance Co. Ltd.*, 165 P.3d 882, 886 (Colo. App. 2007) (holding a plaintiff "cannot maintain an action against [defendant] for tortious interference with any contract to which [defendant] is a party"). In *MDM Grp. Assocs.*, the court held that a defendant cannot be liable

for interference with its own contract because "Neither party is a stranger to the contract. Each party has agreed to be bound by the terms of the contract itself . . . ." While it is true that GPGH is now a party to the LPA, it was not a party to it when the LPA and specifically the obligations under Section 10 were entered into. Although a successor in interest that was obligated to be bound by the terms of the LPA, GPGH did not agree with those terms and set out to have the LPA terminated so it did not have to comply it. For these reasons, GPGH tortiously interfered with the LPA.

IV. The Defendants Breached the Implied Covenant of Good Faith and Fair Dealing under the LPA

Gray Jay Ventures 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.

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)). Importantly, the purpose of the good faith and fair dealing doctrine is to ensure that both parties' reasonable expectations that they will benefit from the contract are not frustrated by the actions of one party. *See Amoco Oil Co.*, 904 P.2d at 498. Each party to contract has justified expectation that other will act in reasonable manner in its performance; when one party uses discretion conferred by contract to act dishonestly or to act outside accepted commercial practices to deprive other party

of benefit of contract, contract is breached. *Wells Fargo Realty Advisors Funding, Inc.* 872 P.2d at 1363.

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, Gray Jay breached its implied covenant in a number of ways. First, it refused to act as Landlord under the LPA, as the successor in interest to Redwood Capital. Under section 13 of the LPA, GRH, the predecessor in interest to Gray Jay, 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, Gray Jay (and now GR Terra) did not assume the role of Landlord and refused to honor Headwaters' option to purchase the Amenities. GRMD's reasonable expectations were frustrated by Gray Jay and GR Terra's refusal to be bound by the LPA.

These facts state more than a plausible claim for violation of the covenant of good faith and fair dealing.

CONCLUSION

For all of the foregoing reasons, GRMD requests that this Court deny the Private Defendants' motion to dismiss and allow the case to go forward through the case management and discovery stages.

Dated this 30th day of July, 2021.

NORTON & SMITH,
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s/ Charles E. Norton
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Counsel for Plaintiff

CERTIFICATE OF SERVICE

I certify that on the 30th day of July, 2021, a true and correct copy of the foregoing **RESPONSE IN OPPOSITION TO GRAY JAY VENTURES, LLC, GRANBY PRENTICE, LLC, and GR TERRA, LLC MOTION TO DISMISS THE SECOND AMENDED COMPLAINT 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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