

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.:
<i>Counsel for Plaintiff:</i> Charles E. Norton, #10633 Alicia M. Garcia, #53860 NORTON & SMITH, P.C. 600 17 th Street, Suite 2150S Denver, Colorado 80202 Phone Number: (303) 292-6400 FAX Number: (303) 292-6401 E-mail: CNorton@NortonSmithLaw.com AGarcia@NortonSmithLaw.com	
<p style="text-align: center;">PLAINTIFF GRANBY RANCH METROPOLITAN DISTRICT’S RESPONSE IN OPPOSITION TO HEADWATER’S MOTION TO DISMISS THE SECOND AMENDED COMPLAINT PURSUANT TO C.R.C.P. 12(B)(1) & (5)</p>	

Plaintiff Granby Ranch Metropolitan District (“GRMD”), through its undersigned counsel, submits the following Response in Opposition to Headwater Metropolitan District’s (“Headwaters”) 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 CASE

Plaintiff GRMD commenced this action on February 23, 2021 by filing a complaint against two defendants, Headwaters and GP Granby Holdings, LLC (“GPGH”) (collectively

referred to as the “original defendants”). 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 Subsequently, the Original Defendants filed a notice with the court stating that the original Complaint was superseded by the Amended Complaint and thus they would not be filing any reply briefs in support of their motion to dismiss.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 and to reflect Gray Jay’s name change.

At the core of this lawsuit is the LPA and the failure of the defendants to oblige by its terms. As a threshold matter, 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.

GRMD presented an extensive factual recitation in its Introduction and Procedural Posture on pages 1-4 of its Response in Opposition to Gray Jay Ventures, Granby Prentice, and GR Terra’s Motion to Dismiss. Given the substantial overlap of the defense motions, GRMD incorporates that Introduction fully into this Response.

RESPONSE TO STATEMENT OF FACTS

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

Headwaters came into existence pursuant to a Service Plan approved by the Town of Granby and dated March of 2003. Headwaters was originally called Sol Vista Metropolitan District No. 1; its name was changed to Headwaters on October 23, 2004. Plaintiff GRMD (called Sol Vista Metropolitan District No. 2) was organized at the same time through a separate Service Plan. Its name was changed to Granby Ranch Metropolitan District, also on October 23, 2004. The two service plans are attached as Exhibits 1 and 2 to the Second Amended Complaint. Both Service Plans contemplated that multiple districts may be organized whose boundaries would include the residential areas of Granby Ranch and major amenities including a golf course, fishing access rights, and a ski area.

Headwaters covers a geographic area of approximately 7 acres, versus about 3,563 acres for GRMD. This disparity may seem puzzling until it is understood that Headwaters was to be the "Service District," and GRMD the "Taxing District." As is a common practice for development projects taking advantage of the Special District Act, when the two Districts were first organized, the property was owned entirely by a private development company, in this case

SolVista Corp. (This entity later became the developer Granby Realty Holdings, LLC, or “GRH.”). SolVista conveyed property interests in small tracts of land, either through outright conveyance or options to purchase. This would qualify the transferees to vote in Headwaters and GRMD elections pursuant to C.R.S. 32-1-103(5)(a), C.R.S., and to petition for the organization of the district and submit a proposed service plan.

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

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

and 4.3. As section 4.4 of the Master IGA succinctly put the point, “the Service District shall manage and administer all business affairs of the Districts.”

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

On May 26, 2005 Headwaters and GRMD passed a Joint Resolution to Establish a Facilities Fee, a document which is mentioned expressly in Recital B to the LPA. This Fee Resolution, which is attached as Exhibit 4 to the Second Amended Complaint, established that Headwaters would impose and collect an Amenity Fee in coordination with GRMD. The recited purpose of this Amenity Fee was “to provide a source of funding to pay for costs incurred by the Districts (defined as Headwaters and GRMD) for the financing, acquisition, installation, and/or replacement of the Amenities...and such fees and charges are necessary for the prosperity and general welfare of the Districts and their inhabitants...” The Amenities were defined as including a “golf course, ski area, river park and related improvements...”

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

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

Section 5 of the Granby IGA provided that “In addition to the types of park and recreation services and facilities referenced to or reflected in the Service Plans, including the exhibits thereto, the Districts will be authorized to acquire, construct, own, operate and maintain the ski area and lifts, ski lodge, golf courses and appurtenant clubhouse and maintenance facilities, fishing or river park facilities and programs, and parks, trails and open space for various recreational purposes as more fully described in Exhibit A, attached hereto and incorporated herein by reference, collectively called the ‘Amenities.’” The Amenities listed on Exhibit A included a “Fishing Camp” on the Fraser River, the 18-hole Headwaters Golf Course, the SolVista Ski Basin, and parks, trails, and recreation areas within the Granby Ranch property.

It is important to note that the term “Districts” was defined on page 1 of the Granby Ranch IGA. The term included Headwaters, GRMD, and the Granby Ranch districts Nos. 2-8. All of these entities were collectively given the power to acquire the Amenities. In order to defray the costs of this acquisition, the Districts were authorized to impose and collect a one-time, front end Amenities Fee, in an amount not to exceed \$10,000.00 per lot or equivalent dwelling unit. See Granby IGA, Section 5(c).

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

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

The LPA was the consummation of this vision in the Granby IGA that the Amenities would be under public ownership. It is attached to the Second Amended Complaint as Exhibit 6. In Recital B., the LPA notes that “in order to pay rental payments with respect to the Leased Premises and to pay the purchase price of the Leased Premises,” Headwaters had “previously adopted, with the Granby Ranch Metropolitan District, a Joint Resolution to Establish an Amenity Fee...” In Section 23 of the LPA, Headwaters and the developer, GRH, agreed that the “Purchase Price” for the Amenities would be the lesser of the Adjusted Appraisal Value of the Leased Premises subject to increases for the value of capital improvements adjusted for inflation and all Amenity Fees collectable by Headwaters under the Amenity Fee Agreements and the Fee Resolution. The Amenities would also pass to the Tenant on December 31, 2062 if the Lease had not been terminated in accordance with Section 2(a), and (b) or (c) of the LPA.

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

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

The parties also acknowledged that the Leased Premises were subject to the Redwood Capital Deed of Trust, and that GRH would cause a Subordination, Non-Disturbance and Attornment Agreement (“SDNA”) to be delivered to Headwaters. However, the parties also exchanged “an agreement executed by the Lender either subordinating this Lease to the deed of trust held by the Lender but obligating the Lender and any successor thereto to be bound by this Lease and by all of Tenant’s rights hereunder (to the extent that such Lender should succeed to the interest of Landlord and/or acquire title or right of possession of the Leased Premises) including but not limited to the rights of Tenant conferred by Sections 2 and 23 hereof. Such agreement provides that, notwithstanding any other agreement with the Landlord, the Lender’s consent shall not be required to permit the acquisition of the Leased Premises by the Tenant in accordance with the terms hereof.”

On November 8, 2016, the Town of Granby, Headwaters, GRMD, and the Granby Ranch Metropolitan Districts Nos. 2-8 entered into an Amended and Restated Intergovernmental Agreement replacing the Granby IGA (the “Second Granby IGA”), which is attached to the

Second Amended Complaint as Exhibit 7. In this Second Granby IGA, Section 5 a., the parties re-affirmed the authority of “the Districts” to acquire the ski area and lifts, ski lodge, golf courses and appurtenant clubhouses and maintenance facilities. Exhibit A to the Second Granby IGA lists the same Amenities as the original Granby IGA that could be acquired by the Districts.

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

As a result of this dispute, the Districts collectively amended their Service Plans to eliminate any relationship between Headwaters as the service district and the other Granby Ranch Districts, including GRMD, as the tax districts. In a document entitled “Termination of Intergovernmental Agreement” between GRMD, Granby Ranch Metropolitan Districts Nos. 2 through 8, and Headwaters, dated November 17, 2017 (the “Termination IGA”), the parties agreed to terminate the prior master IGAs under which the Granby Ranch districts would finance the roads and other related infrastructure within Granby Ranch and Headwaters would construct and operate that infrastructure. In Recital G. of the Termination IGA, the parties indicated their intent that GRMD should operate independently of Headwaters. A copy of the Termination IGA is attached to the Second Amended Complaint as Exhibit 8.

It is important to note that at this stage of the proceedings, there has been no evidence that the Second Granby IGA was terminated or that the authority that the Town of Granby had given to “the Districts” to purchase the Amenities had been taken away. The LPA was entered

into in 2012 pursuant to the authority granted by the original Granby IGA, which was dated in 2008, and that authority was reaffirmed in the Second Granby IGA in 2016.

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

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

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

From the time of Mr. Richardson’s correspondence of September 1, 2020 through the filings of the motions to dismiss by Headwaters and GPGH, GPGH has taken the position that

the LPA was wiped out by the public trustee foreclosure. At no time has it been noted that Redwood Capital delivered an agreement to Headwaters at the time the LPA was entered into stating that Redwood Capital and its successors would be bound by the terms of the LPA, including the right of Headwaters to purchase the Amenities and related property.

On May 5, 2021, Defendant GR Terra LLC bought the subject property and Amenities from Gray Jay. GR Terra now contends that made the purchase free and clear of the LPA.

STANDARD OF REVIEW

Headwaters filed this motion to dismiss under C.R.C.P. 12(b)(1) for lack of subject matter jurisdiction, and C.R.C.P. 12(b)(5) for failure to state a claim upon which relief can be granted. While Headwaters does not distinguish which portions of its motion to dismiss is based on C.R.C.P. 12(b)(1) and which relies on C.R.C.P. 12(b)(5), it is apparent that the only theory which likely qualifies for analysis under 12(b)(1) is the contention that GRMD is not a third-party beneficiary of the LPA and thus lacks standing to maintain this action.

However, like the Private Defendants' did in their Motion to Dismiss, Headwaters has also conflated subject matter jurisdiction (C.R.C.P. 12(b)(1)) with failure to state a claim (C.R.C.P. 12(b)(5)). 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 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 in the trial court 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 925-27.

On page 5 of its Motion to Dismiss, Headwaters notes that “it is the plaintiff’s burden to prove subject matter jurisdiction”; that “the court may consider evidence beyond the pleadings and make any necessary factual findings to determine the jurisdictional issue”; and that “the trial court may decide the jurisdictional issue as a matter of law.” However, what Headwaters fails to note is that none of this can be accomplished without an evidentiary hearing, and in fact the case which Headwaters cites 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. Trujillo*, 397 P.3d 370, 373 (Colo.

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.

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 LPA with standing to bring this suit.

In its motion to dismiss, Headwaters contends that GRMD lacks standing to bring this suit because it is not a third-party beneficiary of the LPA. 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.

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).

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); *Parrish Chiropractic Centers, P.C. v. Progressive Cas. Ins. Co.*, 847 P.2d 1049, 1056 (Colo. 1994) (holding that while the intent to benefit the non-party need not be expressly recited in the contract, the intent must be apparent from the terms of the agreement, the surrounding circumstances, or both). In *E. Meadows*, the Court held that in determining whether a party is a third-party beneficiary:

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

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

In *E.B. Roberts Construction Co.*, the Colorado Supreme Court found a third party, Concrete Contractors, Inc. (“CCI”), was a third-party beneficiary of a contract between Ideal Construction

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

Unlike the situation in *E.B. Roberts*, where third party beneficiary status was found despite the fact that the contract nowhere mentions the third-party, the LPA mentions GRMD expressly in Recital B, which notes that Headwaters had previously adopted, with the Granby Ranch Metropolitan District, a Joint Resolution to Establish an Amenity Fee dated May 26, 2005. In its Motion to Dismiss, Headwaters makes light of this reference, saying that it is not located in the provisions of Section 26 regarding subordination or the provisions of the LPA giving Headwaters an option to purchase. However, Headwaters simply ignores the very first phrase in Recital B., which notes that the Joint Resolution imposing the Amenity Fee had been adopted “In order to pay rental payments with respect to the Leased Premises and pay the purchase price of the Leased Premises.” GRMD jointly adopted an Amenities Fee with Headwaters to allow Headwaters to fund the rental payments for the ski area and golf course and eventually to buy

them. This reference alone gives rise to a plausible inference that the acquisition of the Amenities 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.

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. 2-8 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.

Headwaters contends that GRMD is not a third-party beneficiary because the plain language of the LPA does not confer any benefit onto GRMD and that GRH and Headwaters made clear

the at LPA was the “entire” agreement of the parties as it related to the Leased Premises. It further states that the Granby IGA and the Joint Fee Resolution do not give GRMD an enforceable right to acquire the amenities because GRH was not a party those agreements.

However, the interpretation of a written document is a question of law. *Shaw v. Sargent School District No. RE-33-J*, 21 P. 3d 446, 449 (Colo. App. 2001), citing *In re Trusts Created by Ferguson*, 929 P.2d 33 (Colo.App.1996). If the language of the document is plain, its meaning clear, and no absurdity is involved, it must be enforced by the court as written. *Hudgeons v. Tenneco Oil Co.*, 796 P.2d 21 (Colo.App.1990). The Joint Fee Resolution is expressly identified in the LPA as the source of rental payments under the LPA, and it is part of the provisions of the LPA. It may be examined by this Court in interpreting the LPA under Section 28 e.

Further, even if the Joint Resolution were deemed to be extrinsic evidence under the merger clause (which it is not) it is admissible because it is being used to explain the LPA, not to vary its terms. *Centennial-Aspen II Ltd. Partnership v. City of Aspen*, 852 F.Supp. 1486, 1493 (D.C. Colo. 1995) (parol evidence admissible to explain a contract despite the existence of a merger and integration clause). As the Court of Appeals has held, third party beneficiary status “is a question of fact to be determined by the terms of the contract taken as a whole, construed in the light of the circumstances under which it was made and the apparent purpose the parties were trying to accomplish.” *E. Meadows*, 66 P.3d at 214. Examination of the Joint Fee Resolution is part of interpreting the LPA as a whole and understanding the circumstances under which it was made and the apparent purpose the parties were trying to accomplish.

Headwaters also argues that GRMD was not an intended third-party beneficiary because Headwaters collected the fee and remitted it to the Landlord, GRH. 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. Second 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 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. 16. 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.

Both Headwaters and the Private Defendants mention the provisions of the LPA that call for the Lease to be terminated if Headwaters elected not to appropriate funds to pay the amounts due under the LPA. However, this power to terminate is illusory, and it sheds no light on the status of GRMD as a third-party beneficiary. No general fund monies would ever be needed to provide funding under the LPA, since the rental payments consisted entirely of the Amenity Fees and those Fees could only be used to make payments under the LPA. Pursuant to section 3 b. of the

LPA, the chair and president of the Tenant is obligated to request the required appropriation for each renewal term, which requests were to be “made in good faith” “and in accordance with appropriate procedures.” Headwaters of course does not assert that any of this happened, precisely because it intended in bad faith to try to terminate the LPA to benefit Granby Prentice and the purchaser of the Amenities, GR Terra. The assertion that Headwaters had a unilateral power to terminate the LPA without regard to the interests of intended third-party beneficiaries is without merit.

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. Headwaters Breached the LPA, the Master IGA, Granby Ranch IGA, and the Second Granby IGA by failing to manage the affairs of GRMD and Granby Ranch Metropolitan Districts Nos. 2-8, which included acquiring the Amenities on behalf of GRMD.

As discussed in Section I above, Headwaters had a duty under the LPA, the Master IGA, Granby Ranch IGA, and the Second Granby IGA to manage the affairs of GRMD and Granby Ranch Metropolitan Districts Nos. 2-8, which included acquiring the Amenities on behalf of GRMD. Although it is true that Headwaters only had an option to purchase the Leased Premises under the LPA (and given authority to collect a fee to do so through the Master IGA and the Granby Ranch IGA), it was required to manage and maintain the Amenities during the term of its lease. As discussed in further detail below, Headwaters ceased to operate the Amenities when it no longer wanted to be bound by the terms of the LPA. For these reasons, GRMD has stated a plausible claim for relief for Breach of Contract by Headwaters.

III. **Headwaters Breached the Implied Covenant of Good Faith and Fair Dealing under the LPA**

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

Instead, Headwaters participated in a series of sham terminations and retention agreements with operators for the ski area and golf course, all so GPGH could argue that the LPA had been terminated since Headwaters had not operated the Amenities for a thirty-day period. As a third-party beneficiary to the LPA, GRMD was no longer able to benefit under the LPA because of Headwater’s failure to perform its obligations in good faith. GRMD’s reasonable expectations were frustrated by Headwaters refusal to assert its rights under the LPA and instead participating

in the series of sham agreements so that the LPA would be terminated. These facts state more than a plausible claim for violation of the covenant of good faith and fair dealing.

In its motion to dismiss, Headwaters cites to *Logixx Automation, Inc. v. Lawrence Michels Family Trust*, 56 P.3d 1224 (Colo. App. 2002) for the assertion that Headwaters cannot conspire with Gray Jay because the LPA was extinguished prior to that termination notice based upon the August 2020 foreclosure. In the alternative it contends that even if it was not extinguished, Gray Jay became the landlord under the LPA and GRMD's claim fails because parties to a contract cannot conspire to breach their own contract.

However, in *Logixx Automation* at issue was whether a conspiracy to breach a contract claim was barred by the economic loss rule and whether there was an independent duty for parties to a contract not to conspire with another signatory of the contract to breach the contract. On holding that there can be no conspiracy by two or more parties to a contract to breach that contract, the court noted that "the only duty a contracting party owes is to perform the contract according to its terms, a contracting party has no independent duty not to conspire to breach its own contract with another signatory to that contract. *Logixx Automotive*, 56 P.3d 1232. Importantly, this analysis applied to the tort claim of conspiracy to breach contract and not to the implied covenant of good faith and fair dealing.

Here, GRMD is not alleging the tort claim of conspiracy to breach a contract against Headwaters but rather is alleging that Headwaters breaching the implied covenant of good faith and fair dealing when it participated in the series of sham agreements and when it refused to abide by the contract terms and refused to assert its rights under the LPA. Headwaters worked actively with Gray Jay to manufacture a justification for terminating the LPA and thus deprive GRMD of the benefit of owning the Amenities as contemplated by the LPA.

CONCLUSION

For all of the foregoing reasons, GRMD requests that this Court deny Headwaters' 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 HEADWATER'S 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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