COLORADO COURT OF APPEALS 2 East 14th Avenue, Denver, Colorado 80203	DATE FILED May 15, 2025 7:11 PM FILING ID: D4AB566039BBD CASE NUMBER: 2025CA894
Appeal from: Grand County District Court, 2021CV030008, Hon. Judge Mary C. Hoak	
Plaintiff-Appellant: GRANBY RANCH METROPOLITAN DISTRICT, a quasi-municipal corporation and political subdivision of the State of Colorado, v. **Defendants-Appellees:** HEADWATERS METROPOLITAN DISTRICT, a quasi-municipal corporation and political subdivision of the State of Colorado; GRAY JAY VENTURES, LLC; GRANBY PRENTICE, LLC; GR TERRA, LLC.	▲ COURT USE ONLY ▲
Attorneys for Appellant: David K. TeSelle, Reg. No. 29648 dteselle@burgsimpson.com Patrick M. Sweet, Reg. No. 51130 psweet@burgsimpson.com D. Dean Batchelder, Reg. No. 38425 dbatchelder@burgsimpson.com BURG SIMPSON ELDREDGE HERSH & JARDINE, P.C. 40 Inverness Drive East Englewood, Colorado 80112 Tel.: (303) 792-5595	Case No.: _____
NOTICE OF APPEAL	

Plaintiff-Appellant Granby Ranch Metropolitan District ("GRMD") submits this Notice of Appeal pursuant to C.A.R. 3 and 4.

Pursuant to C.A.R. 3(d), GRMD states:

1. Caption.

The caption complies with C.A.R. 32(d).

2. Nature of the Case.

A. General statement of the nature of the controversy.

GRMD and Headwaters Metropolitan District ("Headwaters") are special districts in Grand County, organized as part of a dual-district structure. They, along with the developer and property owner, entered into a series of agreements and resolutions regarding financing amenities in the district. Consistent with the lease purchase agreement (the "LPA"), GRMD understood that this agreement ran with the land as a public interest in the amenities which were acquired with governmental funds. After GRMD property owners paid approximately $6 million toward the amenities, Headwaters and others asserted that the LPA was terminated and was no longer in effect and sought to retain the

amenities as private property without reimbursing the collected funds.

GRMD brought claims against Headwaters and other defendants and, in turn, Headwaters and GR Terra, LLC asserted counterclaims against it.[1]

On January 28, 2022, the district court entered orders dismissing certain claims and parties, but it broadly confirmed that the LPA ran with the land, that GRMD was a third-party beneficiary of the LPA and had standing to assert claims, and that the amenities would revert to a public entity.

On July 30, 2023, the district court reversed itself and determined that GRMD was not a third-party beneficiary of the LPA, did not have standing, and dismissed all of GRMD's pending claims, leaving only the counterclaims asserted against it.

On December 10, 2023, the district court entered a stipulation of the remaining parties ([1] GRMD (as counterclaim defendant), [2]

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[1] GRMD's operative complaint is its October 13, 2022, Third Amended Complaint. Headwaters' and GR Terra, LLC's operative counterclaims were asserted in their respective November 3, 2023, answers and counterclaims.

Headwaters (as counterclaim plaintiff), and [3] GR Terra, LLC (as counterclaim plaintiff)), narrowing the remaining counterclaims.

On March 3, 2025, the district court ruled on the parties' competing motions for summary judgment, broadly denying them but partially granting Headwaters' motion and determining that GRMD breached one of the agreements between the parties (the Exclusion Agreement), entitling Headwaters to damages.

On March 28, 2025, the district court entered an order approving the parties' stipulation to dismiss all other claims, confirming that Headwaters' sole measure of damages was its claimed attorney's fees and costs, and setting a briefing schedule to determine Headwaters' claim for attorney's fees and costs. The parties are presently briefing this motion before the district court.

GRMD now files this notice of appeal to preserve its rights.

B. The judgment, order or parts being appealed and a statement indicating the basis for the appellate court's jurisdiction.

1. This court has jurisdiction.

This court has jurisdiction over this matter as an appeal from a final judgment of the district court. The March 28, 2025, order of

the district court is a final judgment: a written, dated, signed order resolving all claims between all parties. It, in combination with the district court's January 28, 2022, July 30, 2023, December 10, 2023, and March 3, 2023, orders resolved all claims between all parties.

GRMD, in an abundance of caution, files this notice of appeal given that the March 28, 2025, order is, or may be, a final judgment. While GRMD and Headwaters are currently litigating Headwaters' claim for attorney's fees and costs and while Headwaters has asserted that its attorney's fees and costs are damages, Colorado caselaw states that the fact that a claim for attorney's fees (however denominated) may be outstanding does not prevent a judgment from being final.[2]

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[2] "[A] judgment on the merits is final and appealable notwithstanding an unresolved issue of attorney fees. Such a rule ensures operational consistency and predictability by permitting litigants to comply with the relevant appellate rules without a case-by-case analysis of the relationship of attorney fees to the relief sought." *L.H.M. Corp., TCD v. Martinez*, 2021 CO 78, ¶ 23 (noting "brightline" nature of rule) (cleaned up).

Therefore, in an abundance of caution, GRMD files this notice of appeal. GRMD does not believe that filing this notice of appeal divests the district court of jurisdiction over Headwaters' pending motion for fees and costs. Further, to ensure an efficient presentation and resolution of the issues in this appeal, GRMD anticipates filing a motion with this court to stay this appeal pending resolution of the issue of attorney's fees and costs so that the issues on appeal may be resolved in a single proceeding.

2. GRMD's advisory notice regarding the orders appealed from.

GRMD provides notice that it appeals from the adverse rulings in the following orders (while reserving its rights to fully identify the specific orders and issues presented on appeal in its opening brief):

- January 28, 2022, Order Granting in Part the Defendant Headwater Metropolitan District's Motion to Dismiss the Second Amended Complaint Pursuant to C.R.C.P. 12(b)(1) & 5.

- January 28, 2022, Order Granting in Part Gray Jay Ventures, LLC, Granby Prentice, LLC, and Gr Terra LLC's Motion to Dismiss Second Amended Complaint.
- January 28, 2022, Order Granting the Motion to Dismiss of Redwood Capital Finance Co., LLC, by Granby Prentice, LLC, Its Successor by Contract and Indeminitor.
- July 30, 2023, Order Denying the Plaintiff / Counterclaim Defendant GRMD's Renewed Motion for Summary Judgment on Counts I, II, and III of Defendant / Counterclaim Plaintiff GR Terra's Counterclaims to GRMD's Third Amended Complaint; Order Granting the Defendant / Counterclaim Plaintiff GR Terra's Cross Motion for Summary Judgment on Counts I, II, and III of Defendant / Counterclaim Plaintiff GR Terra's Counterclaims to GRMD's Third Amended Complaint.
- July 30, 2023, Order Granting the Defendants Headwater Metropolitan District and GR Terra's Renewed Motion under C.R.C.P. 12(b)(1) to Dismiss.

- March 3, 2025, Order Granting in Part Headwaters Metropolitan District's Motion for Summary Judgment on Count I of Headwaters' Counterclaims; Order Denying Headwaters' Motion for Summary Judgment on Count IV of Headwaters' Counterclaims; Order Denying Gr Terra LLC's Motion for Summary Judgment on Count IV of Gr Terra's Counterclaims; Order Denying GRMD's Motion for Partial Summary Judgment Regarding Damages on Count I of Headwaters' Counterclaims.
- Any other order or ruling necessary to, merged into, or related to the above.

C. Whether the judgment or order resolved all issues pending before the lower court including attorney fees and costs.

The March 28, 2025, order (in combination with the above) resolved all issues between all parties pending before the trial court with the exception of Headwaters' May 12, 2025, motion for attorney's fees and costs. This motion is not yet fully briefed and is yet to be resolved by the district court.

D. Whether the judgment was made final for purposes of appeal pursuant to C.R.C.P. 54(b).

No.

E. The date the judgment or order was entered and the date the order was mailed to the parties or their counsel.

Final judgment, reflected in the district court order of that day, was entered and electronically served, via CCE, on counsel Friday March 28, 2025.

F. Whether the lower court granted any extensions to file any motion(s) for post-trial relief, and, if so, the date of the request, and the date to which filing was extended.

No.

G. The date any motion for post-trial relief was filed.

No motions for post-trial relief were filed.

H. The date any motion for post-trial relief was denied or deemed denied under C.R.C.P. 59(j).

No motions for post-trial relief were filed.

I. Whether an appellate court granted an extension to file any notice(s) of appeal, and, if so, the date of the request, and the date to which filing was extended.

No.

3. An advisory listing of the issues to be raised on appeal.

1. Whether the district court erred in its pre-trial rulings, including, without limitation, by erring in its orders interpreting the operative lease purchase agreement or other agreements or resolutions between the parties.

2. Whether the district court erred in its January 28, 2022, orders, including erring by partially granting defendants' motions to dismiss GRMD's claims as asserted in the Second Amended Complaint and dismissing certain parties.

3. Whether the district court erred in its July 30, 2023, order, including erring by granting defendants' motion to dismiss the Third Amended Complaint.

4. Whether the district court erred in its July 30, 2023, order, including erring by partially granting defendants' cross-motion for summary judgment.

5. Whether the district court erred in its March 3, 2025, order, including erring by granting summary judgment.

6. Whether the district court erred in any other ruling in this matter.

4. Whether a transcript of any proceeding taken before the lower court is necessary to resolve the issues raised on appeal.

At the time of this filing, Appellant does not believe any transcripts are necessary to resolve the issues raised on appeal, but if any are, Appellant will timely designate (and request, as necessary) them within seven days of this filing.

5. Whether a magistrate issued the order on review, and if so, whether consent was necessary. If a magistrate issued the order on review and consent was not necessary, whether a petition for review of the order was filed in the district court and ruled upon by a district court judge pursuant to the Colorado Rules for Magistrates.

No.

6. The names of counsel for the parties, their addresses, telephone numbers, e-mail addresses, and registration numbers.

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7. An appendix containing: the judgment or order being appealed; the findings of the court, if any; the motion for post-trial relief, if any; and the lower court's order granting or denying leave to proceed in forma pauperis if appellant is filing without paying the docket fee pursuant to C.A.R. 12(b).

GRMD provides this advisory identification of the issues and orders appealed from, reserving the right to fully identify the issues presented and the orders appealed from in its opening brief:

1. January 28, 2022, Order Granting in Part the Defendant Headwater Metropolitan District's Motion to Dismiss the Second Amended Complaint Pursuant to C.R.C.P. 12(b)(1) & 5.

2. January 28, 2022, Order Granting in Part Gray Jay Ventures, LLC, Granby Prentice, LLC, and Gr Terra LLC's Motion to Dismiss Second Amended Complaint.

3. January 28, 2022, Order Granting the Motion to Dismiss of Redwood Capital Finance Co., LLC, by Granby Prentice, LLC, Its Successor by Contract and Indeminitor.

4. July 30, 2023, Order Denying the Plaintiff / Counterclaim Defendant GRMD's Renewed Motion for Summary Judgment on Counts I, II, and III of Defendant / Counterclaim

Plaintiff GR Terra's Counterclaims to GRMD's Third Amended Complaint; Order Granting the Defendant / Counterclaim Plaintiff GR Terra's Cross Motion for Summary Judgment on Counts I, II, and III of Defendant / Counterclaim Plaintiff GR Terra's Counterclaims to GRMD's Third Amended Complaint.

5. July 30, 2023, Order Granting the Defendants Headwater Metropolitan District and GR Terra's Renewed Motion under C.R.C.P. 12(b)(1) to Dismiss.

6. December 10, 2023, Order Approving and Making an Order of the Court the Parties' Stipulation for Partial Dismissal of Counterclaims.

7. March 3, 2025, Order Granting in Part Headwaters Metropolitan District's Motion for Summary Judgment on Count I of Headwaters' Counterclaims; Order Denying Headwaters' Motion for Summary Judgment on Count IV of Headwaters' Counterclaims; Order Denying Gr Terra LLC's Motion for Summary Judgment on Count IV of Gr Terra's Counterclaims; Order Denying GRMD's Motion for Partial Summary Judgment Regarding Damages on Count I of Headwaters' Counterclaims.

8. March 28, 2025, Order Approving the Stipulation Regarding Dismissal of Certain Claims and Process for Resolution of Remaining Claims and Issues.

Dated: May 15, 2025.

BURG SIMPSON
ELDREDGE HERSH & JARDINE, P.C.

(Signed Original on File)

/s/D. Dean Batchelder
David K. TeSelle, Reg. No. 29648
Patrick M. Sweet, Reg. No. 51130
D. Dean Batchelder, Reg. No. 38425
Attorneys for Appellant

CERTIFICATE OF SERVICE

I certify that on May 15, 2025, I served a true and correct copy of the foregoing **NOTICE OF APPEAL**, via the Colorado Court E-Filing System, upon counsel of record, and filed an advisory copy of the same in the District Court.

/s/ Natalie N. Newlander
Natalie N. Newlander

NOTICE OF APPEAL
(C.A.R. 3(d)(8) APPENDIX)

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ATTACHMENT #1

DISTRICT COURT, GRAND COUNTY, COLORADO P.O. Box 192/307 Moffat Avenue Hot Sulphur Springs, CO 80451 970-725-3357	DATE FILED January 28, 2022 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; and GR TERRA, LLC.	
	▲ **COURT USE ONLY** ▲
	Case No. 2021CV30008 Division: 1

ORDER GRANTING IN PART THE DEFENDANT HEADWATER METROPOLITAN DISTRICT'S MOTION TO DISMISS THE SECOND AMENDED COMPLAINT PURSUANT TO C.R.C.P. 12(b)(1) & 5

This matter comes before the Court on the Defendant Headwaters Metropolitan District's ("Headwaters") Motion to Dismiss the Second Amended Complaint Pursuant to C.R.C.P. 12(b)(1) & 5, filed on July 9, 2021. The Plaintiff Granby Ranch Metropolitan District (the "Plaintiff") filed its Response on July 30, 2021. Headwaters filed a Reply on August 13, 2021. The Court, having considered the pleadings, motions, and applicable authorities, finds and rules as follows:

FACTS

This case involves numerous agreements and fee arrangements for the development, servicing, operation, and financing of Granby Ranch, a golf/ski resort and residential subdivision located in Grand County, Colorado ("Granby Ranch"). Granby Realty Holdings LLC ("GRH")[1] was the developer of Granby Ranch with Redwood Capital Finance Company, LLC ("Redwood Capital") funding the development, secured by a deed of trust (the "2005 Redwood Deed of Trust").

[1] GRH was originally called Sol Vista Corporation and should not be confused with GP Granby Holdings, LLC.

1. Formation of the Districts.

In 2003, GRH sought the organization of two metropolitan districts within Granby Ranch.[2] See C.R.S. § 32-1-101 et seq. The Plaintiff[3] and Headwaters[4] are these two districts (collectively, the "Districts"). The Districts were created to finance, manage, and operate services and infrastructure within Granby Ranch. Headwaters was the "Service District" and the Plaintiff was the "Taxing District." (Sec. Amend. Compl., Ex.s 1 and 2 thereto.)

The Plaintiff was delegated "the power to finance public improvements, impose property taxes, and collect revenue or take other actions in cooperation with [Headwaters] that may be necessary to provide the services and facilities needed within the Service Area." The Plaintiff was thus vested with authority to finance and pay for the parks and recreation within the Districts.[5] The Taxing District[6] was tasked with imposing a mill levy to pay the debt obligations incurred by the Districts; to adopt, impose, collect, and remit to Headwaters such rates, fees, tolls and charges as are established by the Service District to fund its administrative and operating expenses; and, upon the dissolution of Headwaters, to accept responsibility for the operation and maintenance of any infrastructure located within the Taxing District. (Sec. Amend. Compl., Ex. 2, 2003 Master Intergovernmental Agreement, §§ 5.1, 5.2, 5.4.)

Headwaters, as the Service District, provided the administration and actual improvements, services and facilities within the Districts. According to the 2003 Master IGA[7], Headwaters was considered the "Service District" tasked 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" for the Taxing District. In addition, Headwaters was to "manage and administer all business affairs of the Districts." Headwaters was to own and operate the infrastructure until it was transferred to the Town of Granby or another public agency. Headwaters was also responsible for the construction of the infrastructure and to arrange for its financing. (Sec. Amend. Compl., Ex. 2, 2003 Master Intergovernmental Agreement, Part 4 §§ 4.2-4.3.)

At the same time, Headwaters and the Plaintiff entered into an Intergovernmental Agreement with the Town of Granby to reflect responsibilities under the 2003 Master IGA and the Service Agreements (the "2003 Granby IGA") (Sec. Amend. Compl., Ex. 2.)[8] The 2003 Granby IGA was superseded and replaced by the 2008 Intergovernmental Agreement between

[2] These service plans were later terminated in 2016.
[3] GRMD was originally called Sol Vista Metropolitan District No. 2.
[4] Headwaters was originally called Sol Vista Metropolitan District No. 1.
[5] In 2007, the Granby Ranch Metropolitan Districts Nos. 2-8 ("GRMD Nos. 2-8") were formed under a Service Plan approved by the Town. These Districts were also considered "taxing districts."
[6] The taxing district eventually became the Plaintiff and GRMD Nos. 2-8.
[7] The 2003 Master Intergovernmental Agreement attached to the Service Plans (the "2003 Master IGA") describes the interrelationship between the two districts and additional descriptions of their assumed roles and responsibilities. The 2003 Master IGA submitted to the Court is unsigned.
[8] The 2003 Granby IGA appears to have been amended in 2005 and again in 2006, but the parties have not provided copies of these amendments to the Court.

the Town of Granby, the Plaintiff, Headwaters and GRMD Nos. 2-8 in 2008 (the "2008 Granby IGA") (Sec. Amend. Compl. Ex. 5.)

The Court addresses the 2008 Granby IGA is more thoroughly below.

2. The 2005 Joint Fee Resolution.

In May 2005, Headwaters and the Plaintiff passed a Joint Resolution to Establish an Amenity Fee (the "2005 Fee Resolution") (Sec. Amend. Compl. Ex. 4.)[9] According to its terms, Headwaters would impose and collect the Amenity Fee on each lot within the Districts. (Sec. Amend. Comp., Ex. 4, Part 1, Recitals.) The Amenities included "certain recreational amenities benefiting the property within the Districts, which include a golf course, ski area, river park and related improvements, trails, and other recreation improvements, facilities, appurtenances, rights-of-way and other amenities as shall from time to time be acquired, constructed and/or operated by the Districts." Id. The Amenity Fee was to provide "a source of funding to pay for the costs incurred by the Districts for the financing, acquisition, construction, installation, and/or replacement of the Amenities, which are generally attributable to the persons subject to such charges, and such fees and charges are necessary to provide for the prosperity and general welfare of the Districts and their inhabitants and for the orderly and uniform administration of the Districts' affairs." Id.

3. The 2005 Amenity Fee Agreement.

In June 2005, GRH and Headwaters executed an Amenity Fee Agreement (the "2005 Fee Agreement") (Headwater's Mot. Dismiss, Ex. 9.) The Plaintiff was not a party to the 2005 Fee Agreement. This agreement imposed a one-time amenity fee of $10,000, collected by Headwaters, per residential unit, with respect to each lot within the Districts. "Headwaters will impose and collect certain fees as set forth in this Agreement (the "Amenity Fee") for the acquisition, financing, leasing, construction, replacement, operation, maintenance and repair of the Amenities…" (Headwater's Mot. Dismiss, Ex. 9, Recitals.) The amenities were the same as those described in the 2005 Fee Resolution.

The purpose of this agreement was to "entitle certain minimum use and enjoyment of the Amenities" to owners and purchasers of homes and homesites within Granby Ranch. GRH authorized certain "priority access" entitlements for which an Amenity Fee had been paid.

4. The 2008 Granby Intergovernmental Agreement.

The 2008 Granby IGA superseded and replaced the 2003 Granby IGA. The 2008 Granby IGA provided for the Districts and the GRMD Nos. 2-8 "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. Exhibit A to the 2008 Granby IGA more thoroughly describes these amenities." (Sec. Amend. Compl., Ex. 5.) The 2008 Granby IGA recognized the Priority Access given to owners within Granby Ranch, but also stated that

[9] The 2005 Fee Resolution was amended on September 6, 2006, and amended and restated on July 17, 2013.

"preferred access" be given to the Town of Granby residents who are not owners within Granby Ranch. This amounted to various discounts to access the Amenities.

5. The Leased Premises Agreement.

On December 31, 2012, GRH as "Landlord" and Headwaters as "Tenant" entered into the Second Amended and Restated Lease Purchase Agreement (the "LPA") granting Headwaters the right to use and acquire the Leased Premises, including the ski area, golf course, and improvements thereon. (Sec. Amend. Compl. Ex. 6.)[10] The Amenities described in the 2008 Granby IGA are the same as those leased and to be purchased by Headwaters under the LPA.

Headwaters would fund the rental and potential acquisition with the Amenity Fee, authorized pursuant to the 2005 Fee Resolution and the 2005 Fee Agreement. Annual rent consisted of all Amenity Fees collected by Headwaters each year under the 2005 Fee Agreement (as well as another 2005 fee agreement with a different property owner).

Headwaters and GRH also agreed to a Purchase Price for the Amenities which included all Amenity Fees collected by Headwaters under the 2005 Fee Resolution and the 2005 Fee Agreement. The Amenities were to pass to Headwaters on December 31, 2062 if the Lease had not been terminated in accordance with Section 2(a), and (b) or (c) of the LPA.

6. The 2013 Amended and Restated Joint Resolution.

In July 2013, Headwaters, the Plaintiff, and GRMD Nos. 2 and 8 adopted an Amended and Restated Joint Resolution to establish an amenity fee (the "2013 Fee Resolution") continuing the Amenity Fee imposed on properties and collected by Headwaters. (Headwater's Mot. to Dismiss, Ex. 11.)

7. The 2013 Amenity Fee Agreement.

In July 2013, GRH and Headwaters entered into an Amended and Restated Amenity Fee Agreement (the "2013 Fee Agreement") that superseded and replaced the 2005 Fee Agreement. (Headwaters' Motion to Dismiss Ex. 10.)[11]

8. The 2016 Granby IGA.

On November 8, 2016, the Town of Granby, Headwaters, the Plaintiff, and GRMD No.s 2-8 amended and restated the 2008 Granby IGA. (the "2016 Granby IGA") (Sec. Amend. Compl., Ex. 7.) An Exhibit A to the 2016 Granby IGA is said to list the Amenities that would be acquired by the Districts. (Id., Para. 5.a.) Exhibit A to the 2016 Granby IGA was not provided to the Court. Section 5.a., however, of the 2016 Granby IGA provides a fairly comprehensive list and states that "in addition to the types of park and recreation services and

[10] The parties have not provided the Court with the original lease agreement or any of the amendments thereto.
[11] 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. (Headwater's Mot. to Dismiss, Ex. 11, §§ 2-3.)

facilities referenced or reflected in the Service Plans, including the exhibits thereto, the Districts will be authorized to acquire, construct, own, operation and maintain the ski area and lifts, ski lodge, golf courses and appurtenant clubhouses and maintenance facilities, fishing or 'river park' facilities and programs, and parks, trails and open space for various recreational purposes as more fully described on Exhibit A, attached hereto and incorporated herein by reference, collectively called the Amenities." These appear to be the same Amenities as those described in the 2008 Granby IGA (i.e., the fishing camp, the golf course, the ski area, and the parks, trails, and recreation areas). The Districts were authorized to continue the collection of the $10,000 Amenities Fee.

There is no evidence that the parties have terminated the 2016 Granby IGA, or that it has been amended or restated.

9. Termination of the 2006 and the 2008 Master IGAs.

In November 2017, the Plaintiff, GRMD Nos. 2-8 and Headwaters terminated the 2006 and 2008 Master IGAs (the "Termination IGA"). (Sec. Amend. Compl., Ex. 8.) The parties have not provided the Court with copies of either the 2006 or 2008 Master IGAs.

The Termination IGA 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." The Termination IGA further provided that Headwaters, the Plaintiff, and GRMD Nos. 2-8 have "fully satisfied their obligations under the Master IGAs" and those districts waived any right to pursue claims and damages against each other.

10. GRH's Default and Successors-in-Interest.

At some point, GRH defaulted on its loan obligation with Redwood Capital. In March 2020, Granby Prentice, Redwood Capital's successor and then holder of the 2005 Deed of Trust, initiated a foreclosure action pursuant to C.R.S. § 38-38-101. On August 14, 2020, the Public Trustee conducted a public sale to which Granby Prentice submitted the highest bid. Granby Prentice was issued a Certificate of Purchase for the property and it then assigned that certificate to Gray Jay Ventures ("Gray Jay").

On November 11, 2020, Gray Jay notified Headwaters that it was electing to terminate the LPA pursuant to § 10 because Headwaters had ceased to operate the Amenities for a 30-day period.

On May 5, 2021, GR Terra, LLC ("GR Terra") purchased the property from Gray Jay.

11. Procedural History.

On February 23, 2021, the Plaintiff filed its Complaint against Headwaters and Gray Jay. On April 21, 2021, Gray Jay and Headwaters both filed motions to dismiss. On July 6, 2021, the

Plaintiff filed a Second Amended Complaint. The Second Amended Complaint named Gray Jay, Redwood Capital Finance, Granby Prentice, GR Terra and Headwaters as Defendants. Claims I, II, III, IV, and V allege breach of contract claims against Gray Jay, Headwaters, Redwood Capital, Granby Prentice and GR Terra respectively. Claim VI alleges tortious interference with the LPA against Gray Jay, Granby Prentice, and Redwood Capital. Claim VII alleges breach of the covenant of good faith and fair dealing in the LPA against Gray Jay and Headwaters. Claim VIII seeks declaratory relief against Gray Jay and GR Terra in the form of a declaration that the LPA was not terminated by the 2020 foreclosure.

On July 9, 2021, Headwaters filed a Motion to Dismiss the Second Amended Complaint. On the same day, GRH, Granby Prentice, and GR Terra filed their own Motion to Dismiss and Granby Prentice filed a Motion to Dismiss Redwood Capital Finance. Granby Prentice, as successor to Redwood Capital Finance, filed a Motion to Dismiss Redwood Capital Finance as to both the Amended Complaint and the Second Amended Complaint.

RULING

I. Standing

The Court first addresses the applicable standard of review as to the issue of standing. While Headwaters urges the Court to apply Rule 12(b)(1), the Plaintiff contends that the issue is a 12(b)(5) matter. The distinction is critical because the standards applied to each motion differ. Medina v. State, 35 P.3d 443, 452 (Colo. 2001) (comparing and explaining the two standards). Rule 12(b)(1) motions may require an evidentiary hearing to resolve any factual dispute upon which the existence of jurisdiction may turn. Id.

1. Standard of Review

A motion to dismiss under C.R.C.P. 12(b)(1) concerns "'the court's authority to deal with the class of cases in which it renders judgment.'" Paine, Webber, Jackson & Curtis, Inc. v. Adams, 718 P.2d 508, 513 (Colo. 1986). Motions challenging a plaintiff's standing are properly brought under Rule 12(b)(1) contesting the trial court's subject matter jurisdiction. Ferguson v. Spalding Rehab., LLC, 2019 COA 93, ¶ 6; 11 Colo. Prac., Civil Procedure Forms & Commentary § 12:4 (3d ed.) (". . . standing is a component of subject matter jurisdiction and is a constitutional prerequisite to maintaining a lawsuit").

Standing is required to invoke the court's jurisdiction. Rocky Mountain Animal Defense v. Colorado Div. of Wildlife, 100 P.3d 508, 513 (Colo. App. 2004). "Standing is a threshold jurisdictional question that must be determined before a case may be decided on the merits." Defend Colorado v. Polis, 2021 COA 8, ¶ 52; see also Ainscough v. Owens, 90 P.3d 851, 855 (Colo. 2004). Colorado courts provide for broad individual standing. See Ainscough, 90 P.3d at 856 (explaining that Colorado's test for standing "has traditionally been relatively easy to satisfy"). A case, however, must be dismissed where a plaintiff cannot meet the test and criteria for standing. Wimberly v. Ettenberg, 570 P.2d 535, 539 (Colo. 1977).

A motion to dismiss for lack of subject matter jurisdiction does not require the court to apply the same standards as those applied to Rule 12(b)(5) motions. Medina, 35 P.3d at 452 ("whereas Rule 12(b)(5) constrains the court by requiring it to take the plaintiff's allegations as true and draw all inferences in the plaintiff's favor, Rule 12(b)(1) permits the court 'to weigh the evidence and satisfy itself as to the existence of its power to hear the case'"). "In the subject matter jurisdiction context, the court sits as the trier of fact and makes the required findings of fact and conclusions of law as to its jurisdiction." Tabor Found. v. Colorado Department of Health Care Policy & Financing, 2020 COA 156, ¶ fn.3.

The Court declines to conduct a hearing on this issue. Rule 12(b)(1) permits a trial court "to make its own factual findings in determining its subject-matter jurisdiction, it necessarily permits the trial court to hold an evidentiary hearing to resolve any factual dispute upon which the existence of jurisdiction may turn." Medina, 35 P.3d at 452 (citations omitted). The Plaintiff urges this Court to hold such a hearing if the Court chooses to apply the Rule 12(b)(1) standards. However, "if all relevant evidence is presented to the trial court, and the underlying facts are undisputed, the trial court may decide the jurisdictional issue as a matter of law . . . " Id.

The Court disagrees with the Plaintiff's argument that the Court should evaluate the Plaintiff's third-party beneficiary status as one similar to capacity. Capacity is a party's personal right to come into court and generally involves personal qualifications of that party. Currier v. Sutherland, 218 P.3d 709, 712 (Colo. 2009). A third-party beneficiary involves the enforcement of that party's rights under a contract. By definition, it involves a claim or defense. The Plaintiff has not cited any legal authority in which a court addressed a third-party beneficiary's standing as one of capacity, nor has it demonstrated any case law in which a court applied Rule 12(b)(5) standards to a standing claim.

The Plaintiff bears the burden of proving the court's subject matter jurisdiction. Medina, 35 P.3d at 452. The Court is required to dismiss the action "[w]henever it appears by suggestion of the parties or otherwise that the court lacks jurisdiction of the subject matter…" C.R.C.P. 12(h)(3).

2. The Plaintiff is a Third-Party Beneficiary Entitled to Enforce the Terms of the LPA.

The Plaintiff is a third-party beneficiary entitled to enforce the terms of the LPA.

According to Headwaters, the Plaintiff lacks standing to enforce the LPA because it was not a party or successor thereto, was not an intended third-party beneficiary, and the surrounding circumstances do not support any other finding. According to the Plaintiff, it is a third-party beneficiary via the structure of the financing and operation of the Districts. The Plaintiff argues that it was one of the parties contemplated and intended to acquire the Leased Premises and was meant to benefit from Headwaters' rental or acquisition thereof.

"[A] plaintiff must satisfy two criteria in order to establish standing. First, the plaintiff must have suffered an injury-in-fact, and second, this harm must have been to a legally protected interest. Ainscough, 90 P.3d at 855 (citations omitted); Wimberly v. Ettenberg, 570 P.2d 535, 539 (Colo. 1977). "An interest is legally protected if the constitution, common law, or a statute,

rule, or regulation provides the plaintiff with a claim for relief. A plaintiff establishes an injury in fact by alleging facts that show the defendant caused harm to the plaintiff's legally protected interest." Reeves v. City of Fort Collins, 170 P.3d 850, 851 (Colo. App. 2007); Kolwitz v. City of Boulder, 538 P.2d 482, 483 (Colo. App. 1975) (One seeking standing must have some special interest in the subject of the litigation and not just have a general interest as a resident of a community).

Third-party beneficiaries may be entitled to standing if they meet specific criteria. The individual or entity, not a party to an express contract, may bring an action on the contract if (1) the parties to the agreement intended to benefit that 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, 872 (Colo. 2015). Thus, the inquiry examines whether the plaintiff is an intended or incidental beneficiary to the alleged contract:

> 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.

East Meadows Co. LLC v. Greeley Irr. Co., 66 P.3d 214, (Colo. App. 2003)(citing Concrete Contractors, Inc. v. E.B. Roberts Construction Co., 664 P.2d 722, 725 (Colo. App. 1982)).

Intended third-party beneficiaries are those upon which the contracting parties intended to confer a benefit. Everett v. Dickinson & Co. Inc., 929 P.2d 10, 12 (Colo. App. 1996). The benefit must be direct and not merely incidental. Harwig v. Downey, 56 P.3d 1220, 1221 (Colo. App. 2002); Everett, 929 P.2d at 12 ("[I]it is not enough that some benefit incidental to the performance of the contract may accrue to the third party."). The parties' intent must be apparent from the terms of the contract, in light of all surrounding circumstances. Id.; see also East Meadows Co., LLC v. Greeley Irr. Co., 66 P.3d 214, 217 (Colo. App. 2003) ("[A] person who is not a party to an agreement may enforce a contractual obligation if the promise to be enforced is expressly stated in the contract, or is apparent from the agreement and surrounding circumstances, and the benefit conferred is direct and not incidental."). The question of intent "may be evidenced either from the terms of the agreement, the surrounding circumstances, or both." Villa Sierra Condo. Ass'n v. Field Corp., 878 P.2d 161, 166 (Colo. App. 1994).[12]

Incidental beneficiaries are not entitled to standing. Under Colorado law, "[t]he general rule is that one who is not a party to a contract, and from whom no consideration moved, has no connection therewith. He can avail himself of its terms neither as a cause of action nor a defense.'" East Meadows, 66 P.3d at 217 (quoting Continental Casualty Co. v. Carver, 14 P.2d 181, 183 (Colo. 1932)); Bear Creek Development Corp. v. Genesee Foundation, 919 P.2d 948,

[12] Thus, the Court disagrees with Headwaters' argument that the Plaintiff lacks standing because the Complaint fails to allege which provision(s) of the LPA allegedly confer a direct benefit on the Plaintiff. The Plaintiff may have standing, despite the absence of a specific provision, if there is evidence that the parties intended to confer a benefit.

952 (Colo. App. 1996) ("incidental third-party beneficiary to the option contract . . . lacks standing to exercise the option").

This analysis necessarily involves examining the LPA itself. In interpreting a contract, "the primary goal of contract interpretation is to determine and effectuate the intent and reasonable expectations of the parties." Copper Mountain, Inc. v. Industrial Systems, Inc., 208 P.3d 692, 697 (Colo. 2009). The intent of the parties is determined primarily from the contractual language. People ex rel. Rein v. Jacobs, 465 P.3d 1, 11 (Colo. 2020). It may also be evidenced by the circumstances surrounding the contract. Vallagio at Inverness Residential Condominium Association, Inc. v. Metropolitan Homes, Inc., 412 P.3d 709, 718 (Colo. App. 2015). As to the contractual language, the court must give effect to the plain and generally accepted meaning of the contract terms and should be wary of "viewing clauses or phrases in isolation." Copper Mountain, Inc., 208 P.3d at 697. Instead, the Court reads clauses in the context of the entire contract, "seeking to harmonize and to give effect to all provisions so that none will be rendered meaningless." Pepcol Mfg. Co. v. Denver Union Corp., 687 P.2d 1310, 1313 (Colo. 1984). When a contract is unambiguous and complete, courts may conclude that the contractual language expresses the parties' intent and will enforce the terms according to their plain meaning. People ex rel. Rein v. Jacob, 465 P.3d at 11.[13]

The Court notes the LPA does not contain language either expressly creating or disavowing the existence of any third-party beneficiaries. The Court, therefore, examines the contract as a whole and the surrounding circumstances to determine the parties' intent. Jefferson County School Dist. No. R-1 v. Shorey, 826 P.2d 830, 843 (Colo. 1992); Vallagio at Inverness Residential Condo. Ass'n, Inc. v. Metro. Homes, Inc., 412 P.3d 709, 718 (Colo. App. 2015); (parties' intent to confer benefit on third party may be evidenced by the circumstances surrounding the contract); Villa Sierra Condominium Ass'n, 878 P.2d at 166.

The Court finds "surrounding circumstances" to include the Service District Agreements for Headwaters and the Plaintiff, the 2003 Master Agreement,[14] the 2005 Fee Resolution, the 2005 Fee Agreement, and the 2008 Granby IGA. These documents were in force when Headwaters and GRH executed the LPA. These documents also reflect the complex and interrelated relationship between Headwaters and the Plaintiff, as well as the purposes of the dual-district structure.

Headwaters' overall argument is that no provision of the LPA manifests an intent to confer specific legal rights on the Plaintiff. The Court disagrees because the LPA specifically references the Plaintiff, and, likewise, references the agreements and plans just discussed. These documents outline the Plaintiff's interest and expectation in the Leased Premises/Amenities.

The Court finds the Plaintiff was an intended third-party beneficiary because the LPA appears to reflect a culmination of these different agreements and plans for the following reasons.

[13] Neither party raises an ambiguity issue.

[14] As previously indicated, the Court does not have copies of any restatements or amendments to the 2003 Master IGA.

a. The LPA.

The Plaintiff and the 2005 Resolution and the 2005 Fee Agreement are both specifically described within the LPA. Recital B provides:

> In order to pay rental payments with respect to the Leased Premises and pay the purchase price of the Leased Premises, Tenant has previously adopted, with the Granby Ranch Metropolitan District, a Joint Resolution to Establish an Amenity Fee dated May 26, 2005, as amended September 6, 2006 (as amended from time to time, the "Fee Resolution"), and has entered into that certain Amenity Fee Agreement with Granby Realty Holdings LLC dated as of June 1, 2005, and that certain Aspen Meadows Amenity Fee Agreement with Aspen Meadows Condominiums, LLC dated as of July 5, 2005 (collectively, the "Fee Agreements"), pursuant to which resolution and agreements the Tenant imposes Amenity Fees (as further described herein) on property within the Granby Ranch development ("Granby Ranch") for use of the Leased Premises, as more particularly described therein.

At first blush, the Court was inclined to disregard the recital language as merely prefatory. In Colorado, however, while recitals are not "strictly any part of the contract" and cannot extend contractual stipulations, they may have material influence on the construction of the contract and the determination of the parties' intent." Las Animas Consol. Canal Co. v. Hinderlider, 68 P.2d 564, 566 (Colo. 1937). Section 28(a) of the LPA states that its recitals are to be "incorporated into the covenants of this lease by reference."

The 2005 Fee Resolution and Agreement are especially relevant in determining the parties' intent. The LPA defines the Amenity Fees as those fees "imposed pursuant to the [2005] Fee Resolution and the [2005] Fee Agreements, as the same may be amended or restated from time to time, and any other resolution adopted or agreement entered into for the purpose of imposing fees related to the use of the Leased Premises." (Sec. Amend. Compl., Ex. 6, ¶ 3.a.)

Recital D demonstrates some evidence that the Plaintiff used and benefitted from the Leased Premises. Recital D provides, pursuant to the Headwaters' Service Plan and the 2008 Granby IGA, "the Leased Premises are used by the taxpayers, residents, occupants, visitors, and invitees of Granby Ranch." Section 4(a) of the LPA reaffirms that Headwaters was to use the Leased Premises "for the enjoyment" of the same users. As previously noted, the Plaintiff alleges that it contains the "overwhelming majority" of such taxpayers, residents, and occupants. (Sec. Amend. Compl., ¶ 25.)

Headwaters also cites to Paragraphs 28.e. and 28.f. as evidence of an intent not to have any third-party beneficiaries:

> e. 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.

> f. 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. This instrument shall not become binding upon the Parties until it shall have been executed and delivered by both Landlord and Tenant.

(Sec. Amend. Compl. Ex. 6.)

The Court finds this language informative but not determinative as to standing. The terms are limited to "the Leased Premises and the provisions of this Lease," which do not necessarily implicate the many other documents at play in this case and discussed below.

i. The District Service Plans and the 2003 Master IGA.

The Districts' service plans provide the why and how each district was to function. The plans are directly related to one another and essentially provide for the financing and operation of "community-wide infrastructure and public facilities and services that will service the [Granby Ranch] Development." The plans describe the dual district structure and detail the "consolidated financial management and operation of the Districts."

As previously discussed, the Plaintiff was authorized to impose a mill levy and collect fees to provide services and facilities to the Districts. (Sec. Amend. Compl., Ex. 2, Part 4, 2003 Master IGA, ¶ 5.1, 5.2.) Said services and facilities included "ski areas and/or ski lifts, golf courses … and other recreational facilities, together with all necessary, incidental and appurtenant facilities, land and easements…" (Sec. Amend. Compl., Ex. 2, Part 1, Taxing District Service Plan, ¶ III.C.)

The Service Plan Agreements reflect a symbiotic relationship between the Districts. (See Sec. Amend. Compl., Ex. 1, Sol Vista Metro District No. 1 Service Plan, ¶ IV.A.; Ex. 2, Part 1, Sol Vista Metro District No. 2 Service Plan, ¶ IV.A.) The Taxing District taxed and financed the services and infrastructure that the Service District acquired, constructed, and operated. There isn't any indication in these plans that the two districts were meant to operate independently from one another.

The 2003 Master IGA[15] between Headwaters and the Plaintiff further addresses the interrelationship between the two districts and describes this mutual cooperation. It provides that Headwaters would manage and control the construction and financing of the infrastructure and establish all necessary service charges including the "development fees" for the Plaintiff. (Sec. Amend. Complaint, ¶ 14 and Ex. 2, part 4, Master IGA, Sections 4.2 and 4.3.) "The Service District shall manage and administer all business affairs of the Districts . . . " (Sec. Amend.

[15] To the extent that this 2003 Master IGA was terminated per the Termination Agreement, the Court notes that the latter was limited to a termination of the 2006 and 2008 Master IGAs, which have not been submitted to the Court. The Court, therefore, cannot determine as a matter of law whether the Termination Agreement eliminated the interrelated duties between the Districts according to the 2003 Master IGA.

Complaint, Ex. 2, part 4 Master IGA, Section 4.4.) Headwaters would own and operate the infrastructure until it was transferred to the Town of Granby or another public agency. (Sec. Amend. Complaint, Ex. 2, part 4 Master IGA, Section 4.5.) Lastly, Section 5.4 of the Master IGA provides that "upon receipt of notice and the dissolution of the Service District in accordance with its Service Plan, the Service District shall transfer, and the Tax District shall accept responsibility for the operation and maintenance of any Infrastructure located within the Tax District, which has not been transferred to the Town or another public agency." (Sec. Amend. Complaint, Ex. 2, part 4, Master IGA, Section 5.4.)

The 2003 Master IGA thus indicates that it was never intended for Headwaters to permanently operate and maintain the infrastructure – the Plaintiff had an expectation to do so if services and facilities were not transferred to the Town of Granby or another public agency.

b. The 2005 Fee Resolution between Headwaters and the Plaintiff.

The 2005 Fee Resolution was executed "in the best interests of the Districts to acquire, lease, construct, maintain, provide, operate, and or administer" the Amenities "benefiting the property within the Districts," which included the golf course, ski area, river park and other improvements. (Sec. Amend. Compl., Ex. 4, part 1, Recitals.) It was deemed necessary "to provide for the prosperity and general welfare of the Districts and their inhabitants." Id.

The resolution authorized Headwaters to impose and collect an "Amenity Fee" to fund the Amenities for these purposes. The revenue generated thereby was to be "used solely for the purpose of financing the acquisition, leasing, construction, and replacement of the Amenities" and such "restriction on the use of the Amenity Fee revenues shall be absolute and without qualification." (Sec. Am. Compl., Ex. 4, Part 3, Section 6.) The 2005 Fee Resolution also detailed the priority access to the Amenities given to each residential dwelling unit for which the Amenity Fee had been paid. (Sec. Am. Compl., Ex. 4, Part 1, Section 2.)

The Court notes that none of the Resolution's language limited any of the stated benefits to Headwaters and the Service District alone. Thus, the Resolution evidences an intent to benefit the Plaintiff for any acquisition, lease, and operation of the Amenities within both Districts.[16] Headwaters was to impose and collect a fee to lease, acquire, construct, maintain, operate, or administer the Amenities and it was in the best interests of both districts to do so.

The Court disagrees with the argument that only GRH can enforce the 2005 Fee Agreement because the Plaintiff was not a party thereto. The 2005 Fee Resolution authorized Headwaters to enter into the 2005 Fee Agreement. Presumably, Headwaters could not have performed these taxing and financing functions without the Plaintiff's consent (which was a function reserved to the Plaintiff). As alleged by the Plaintiff, "Headwaters is collecting the Amenity Fee through GRMD and pursuant to GRMD's legislative authority pursuant to C.R.S. 32-1-1001(j)(I)." (Sec. Amend. Compl., ¶ 26.) It would be illogical for the Plaintiff to enter

[16] The 2013 Amended Fee Resolution affirmed this intention - it was "in the best interests of the Districts, and the property owners, taxpayers, and residents of Districts," to acquire use and ownership of the Amenities. (Headwaters Mot. to Dismiss, Ex. 11, Recitals.)

into the 2005 Fee Resolution if the Plaintiff would not benefit from the 2005 Fee Agreement or if Headwaters could have imposed and collected the Amenity Fee without adoption of the Resolution.

The Court also disagrees with Headwaters' argument that GRH's and Headwaters' decision not to incorporate the 2005 Fee Agreement into the LPA or to designate the Plaintiff as a third-party beneficiary indicates GRH's and Headwaters' intention not to confer a benefit upon the Plaintiff. The 2005 Fee Resolution was specifically referenced in the LPA. (See Recital B, §§ 3.b. and 23.) The Plaintiff was a party to the Resolution and, as previously discussed, the 2005 Fee Resolution appears to have authorized Headwaters to act in the Plaintiff's place by imposing and collecting a fee within the Districts.

Lastly, the Court recognizes the Developer was not obligated to convey, lease, or otherwise contract for any Amenities under the 2005 Fee Agreement, however, this has limited bearing on whether the surrounding circumstances reflect an intent to confer a benefit on the Plaintiff. Simply because the Developer was not required to sell does not eliminate the Plaintiff's expected benefit in the event that the Developer did, in fact, convey or lease the Amenities.

c. The 2008 Granby IGA.

The Court finds that the 2008 Granby IGA is a "surrounding circumstance" in the LPA's formation. Along with the 2003 Master IGA, the 2008 Granby IGA reflects the relationship between the Districts, as well as the interplay between Districts and the Town of Granby. It is clear to the Court that the Districts were intended to act reciprocally and for one another's benefit. In fact, the Town and the Districts "determined it to be in the best interests of their respective taxpayers, residents and property owners to enter into this Agreement to promote the coordinated development" of the property. (Sec. Amend. Compl., Ex. 5, Recitals.) The described amenities in the 2008 Granby IGA are the same amenities that were subsequently leased and to be purchased by Headwaters under the LPA.

This cooperation indicates the Plaintiff had an active role and expectation in collection of the Amenity Fee and continued operation of the Amenities/Leased Premises when Headwaters and GRH entered into the LPA. See Villa Sierra Condominium Ass'n, 878 P.2d 161 (condominium association was deemed third-party beneficiary to agreement between the city and developer in which city approved project plans in exchange for future street improvements that were never constructed).

To conclude, for the purpose of standing and given the complex relationship between Headwaters and the Plaintiff, the LPA is viewed in light of the operative agreements at the time of the formation of the LPA. Concrete Contractors, Inc. v. E.B. Roberts Const. Co., 664 P.2d 722, 725 (Colo. App. 1982) (question of intent should be taken from the contract, which should be "construed in the light of the circumstances under which it was made and the apparent purpose the parties were trying to accomplish"). The Districts' Service Plans (as well as the 2003 Master IGA), the 2005 Fee Resolution, the 2005 Fee Agreement, and the 2008 Granby IGA (all operative in 2012 and expressly referenced by the LPA), paint a coherent and consistent

picture of their overarching purpose: that the Plaintiff raised revenue for Headwaters to construct, lease, and acquire the Amenities for the use and enjoyment of Granby Ranch residents, taxpayers, and occupants, and that the parties effectuated that intent, in part, through the LPA - the Leased Premises were to be for the use and enjoyment of Granby Ranch residents and invitees, and the LPA was one way that Headwaters fulfilled its obligation to the Plaintiff under these agreements, resolutions, and plans.

The Court finds that, for the purposes of determining subject matter jurisdiction pursuant to CRCP 12(b)(1), that Headwaters and GRH intended to confer a direct benefit on the Plaintiff as a third-party beneficiary.

II. Failure to State a Claim.

The Court partially grants Headwaters' motion to dismiss on the grounds that the Plaintiff failed to state a claim upon which the Court can grant relief.

"A C.R.C.P. 12(b)(5) motion to dismiss for failure to state a claim upon which relief can be granted serves as a test of the formal sufficiency of a plaintiff's complaint. The chief function of a complaint is to give a defendant notice of the transaction or occurrence that is the subject of a plaintiff's lawsuit." Public Service Co. of Colorado v. Van Wyk, 27 P.3d 377, 385 (Colo. 2001). A C.R.C.P. 12(b)(5) motion to dismiss is looked upon with disfavor, and a complaint should not be dismissed unless it appears beyond a doubt that a plaintiff can prove no set of facts in support of her claim which would entitle her to relief. A complaint should not be dismissed for failure to state a claim so long as the plaintiff is entitled to some relief upon any theory of the law. Id. at 385-386 (citations omitted).

In Warne v. Hall, 373 P.3d 588 (Colo. 2016), the Colorado Supreme Court adopted the federal plausibility standard for a motion to dismiss, which is a shift from prior precedent.

> To survive a motion to dismiss, a complaint must contain sufficient factual matter, accepted as true, to state a claim to relief that is plausible on its face. A claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged. The plausibility standard is not akin to a probability requirement, but it asks for more than a sheer possibility that a defendant has acted unlawfully. Where a complaint pleads facts that are merely consistent with a defendant's liability, it stops short of the line between possibility and plausibility of entitlement to relief. (internal quotation marks and citations omitted).

Ashcroft v. Iqbal, 556 U.S. 662, 678 (2009). Conclusory allegations are insufficient to state a plausible claim for relief. Coyle v. State, 492 P.3d 366, 371 (Colo. App. 2021). The Court is not required to accept as true legal conclusions couched as factual allegations and a complaint may be dismissed if the substantive law does not support the claims asserted. Western Innovations, Inc. v. Sonitrol Corp., 187 P.3d 1155, 1158 (Colo. App. 2008).

A court may consider only the facts alleged in the complaint, documents attached as exhibits or referenced in the complaint, and matters of which the court may take judicial notice, such as public records. Walker v. Van Laningham, 148 P.3d 391, 397 (Colo. App. 2006) (discussing judicial notice); Yadon v. Lowry, 126 P.3d 332, 336 (Colo. App. 2005) (discussing documents attached or referenced in the complaint); Peña v. Am. Family Mut. Ins. Co., 2018 COA 56, ¶ 14. When documents are presented to the court in a motion to dismiss, the legal effect of the document is determined by their contents rather than by the allegations as stated in the complaint. Peña, 463 P.3d at ¶ 15; Stauffer v. Stegemann, 165 P.3d 713, 716 (Colo. App. 2006). In considering documents attached or referenced in a complaint, "a trial court is not required to accept legal conclusions or factual claims at variance with the express terms of the document attached to the complaint." Stauffer, 165 P.3d at 716.

"A document that is referred to in the complaint, even though not formally incorporated by reference or attached to the complaint, is not considered a 'matter outside the pleading.'" Yadon, 126 P.3d at 336. If that document "is central to the plaintiff's claim, the defendant may submit an authentic copy to the court to be considered on a motion to dismiss, and the court's consideration of the document does not require conversion of the motion to one for summary judgment." Id. (quoting James Wm. Moore et al., Moore's Federal Practice § 56.30[4], at 56–225 & –226 (3d ed.2005)).

Conversion is required, however, if matters are submitted in a motion to dismiss are outside of these described situations. Bristol Bay Productions, LLC v. Lampack, 2013 CO 60, ¶ 46; Churchey v. Adolph Coors Co., 759 P.2d 1336, 1339 (Colo.1988) ("Because [defendant] attached affidavits and exhibits to its motion, the court properly treated [defendant's] motion as one for summary judgment."); Garcia v. Centura Health Corp., 2020 COA 38, ¶ 50 (motion to dismiss properly treated as motion for summary judgment where defendant attached affidavits and exhibits to its motion and the district court considered these attachments in its order).

The Plaintiff attached the following exhibits to its Second Amended Complaint:[17]

- The 2003 Sol Vista Metro District No. 1 Service Plan and exhibits attached thereto (Exhibits A1-A2, B1-B2, C, D, E, and F – which include the 2003 IGA and the 2003 Master IGA);
- the 2003 Sol Vista Metro District No. 2 Service Plan and exhibits attached thereto (Exhibits A1-A2, B1-B2, C, D, E, and F - which include the 2003 IGA and the 2003 Master IGA);
- the 2007 Consolidated Service Plan for GRSD Nos. 2-8 and exhibits attached thereto (Exhibits A, B, C1, C2, D, and E);
- the 2005 Fee Resolution;
- the 2008 IGA;
- the LPA;
- the 2016 IGA; and
- the 2017 Termination IGA.

[17] These are the same exhibits that were attached to the Amended Complaint.

Headwaters attached Exhibits 9-12 to its Motion to Dismiss the Second Amended Complaint:

- the 2005 Fee Agreement;
- the 2013 Amended and Restated Amenity Fee Agreement;
- the 2013 Amended and Restated Amenity Fee Joint Resolution; and
- a Motion for Order of Exclusion of Property from the Plaintiff's District.

Although none of these documents are authenticated, an authentic copy is not required (and conversion unnecessary) where the plaintiff refers to and relies upon that document and does not dispute its authenticity. See Yadon, 126 P.3d at 336. Here, the Plaintiff does not dispute authenticity and refers to the 2005 Fee Agreement in the Amended and Second Amended Complaint (Sec. Amend. Compl., ¶¶23-24, 75, 83). The Plaintiff does not submit any exhibits or affidavits of its own in Response to Headwaters' Motion to Dismiss. Most importantly, the Court does not rely on any of Headwaters' exhibits, other than the 2005 Fee Agreement, in this order.

Conversion is unnecessary. "[I]f matters outside of the complaint are submitted to the trial court, but not considered in review of the [Rule] 12(b)(5) motion to dismiss, the trial court need not convert the motion to dismiss into a motion for summary judgment." Pub. Serv. Co. of Colo. v. Van Wyk, 27 P.3d 377, 386 (Colo. 2001).

Having found the Plaintiff is a third-party beneficiary under C.R.C.P. 12(b)(1), the Court examines whether the Plaintiff has sufficiently satisfied the C.R.C.P. 12(b)(5) standards regarding pleading third-party beneficiary status as to the claims for breach of contract and breach of the covenant of good faith and fair dealing.

The Court addresses the breach of contract claim first.

1. Headwaters' Motion to Dismiss the Breach of Contract Claim is Denied in Part and Granted in Part.

The Court grants in part and denies in part Headwaters' motion to dismiss the Plaintiff's breach of contract claim.

The Plaintiff argues that under the 2008 IGA, the 2008 Granby IGA, and 2016 Granby IGA, Headwaters "had a duty to manage the affairs of GRMD", "which included acquiring the Amenities on behalf of" GRMD. (Sec. Am. Compl., ¶ 54.)

To prevail on a breach of contract claim, a plaintiff must prove: (1) the existence of a contract, (2) that it performed their contractual duties or a justification for nonperformance of contractual duties, (3) that the other party to the contract failed to perform, and (4) damages resulted. Long v. Cordain, 343 P.3d 1061, 1067 (Colo. App. 2014).

i. 2003 Master IGA and Service Plans

The crux of the Master IGA was for Headwaters to take all actions necessary to implement the Service Plan. When Headwaters and GRMD were formed in 2003, they separately entered into Service Plans with the Town. Attached to each Service Plan is a "Master Governmental Agreement" between Headwaters and GRMD as of 2003.[18] The 2003 Master IGA broadly outlines the overarching relationship between those Districts: that GRMD as the Taxing District will raise revenue, Headwaters as the Service District would use that revenue to finance various actions related to public infrastructure and the Amenities, and Headwaters would manage the administrative affairs of GRMD. The Districts acknowledged that performance of the 2003 Master IGA "is essential to the complete implementation of the Service Plans." (Sec. Amend. Compl., Ex. 1, Master IGA, § 3.2.) Section 4 of the Master IGA outlines Headwater's responsibilities. Under the 2003 Master IGA, Headwaters was to, stated broadly: manage and control financing of the infrastructure, process construction of the infrastructure, complete all actions and activities to implement the Service Plans, budget and appropriate monies for public purposes and payment of District expenses, establish fees and charges for the provision of infrastructure and services, own and operate infrastructure until transferred to a public agency, take action to implement and comply with the Service Plan, finance the infrastructure, and complete the infrastructure. (Sec. Amend. Compl., Ex. 1, Master IGA, § 4.)

Section 3 of the Headwaters' Service Plan outlines Headwaters' powers. (Sec. Amend. Compl., Exhibit 1.) With respect to parks and recreation, Headwaters was vested with the power and authority for "the design, financing, acquisition, installation, construction, operation, and maintenance of public parks and recreation facilities…" (§ 3(C), Headwaters Service Plan, Sec. Amend. Compl., Ex. 1.) Those powers were to be "exercised by the [Headwaters'] Board to provide the services and facilities contemplated in the Service Plan." (§ 3(J), Headwaters Service Plan, Sec. Amend. Compl., Ex. 1.) Headwaters was to exercise its powers in the Service Plan to "finance, acquire, construct, install, operate and maintain the public facilities and improvements to be furnished by the District," including park and recreational facilities, which were to be operated and maintained by Headwaters. (§ IV(A), (B)(4), Headwaters Service Plan, Sec. Amend. Compl., Ex. 1.) The Service Plan provides that the Master IGA "shall constitute binding and enforceable agreements between the Districts regarding the implementation of the authorities and powers set forth in the Service Plan." (§ VI(A), Headwaters Service Plan, Sec. Amend. Compl., Ex. 1.)

Effective November 2016, the Districts entered into the Termination IGA. (Sec. Amend. Compl., Ex. 8.) The Recitals to the Termination IGA show that GRMD and Headwaters amended Service Plans to "eliminate any relationship between" Headwaters as the Service District and GRMD as the Taxing District, that the parties intended for GRMD to "operate independently from" Headwaters, and that there was "no further need for the Master IGAs." (Sec. Amend. Compl., Ex. 8, Recitals F-H.) The Amended Service Plans are not before the Court.

[18] The Master IGA attached to both Headwaters' and GRMD's Service Plan is unsigned. Both Headwaters and GRMD have referenced the Master IGA in their motions and response and neither party disputes the authenticity of Exhibit 1 or 2.

The Termination IGA specifically referred to a "2006 Agreement" between GRMD and Headwaters, the First Amendment to the District Facilities Construction and Service Agreement ("2006 Master IGA"), and the 'First Amended and Restated District Facilities Construction and Service Agreement" ("2008 Master IGA"). (Sec. Amend. Compl., Ex. 8, pages 1 and 2.) The Termination IGA specifically terminated the 2006 Master IGA and 2008 Master IGA and the districts collectively agreed that "they have fully satisfied their obligations under the Master IGAs" and were "released from any further obligations" under the Master IGAs. (Sec. Amend. Compl., Ex. 8, §§ 2-5.) The waiver and release is broad: each district waived their right to recover from each of the other districts "from and against any and all costs, losses, claims, liabilities, damages…actions, causes of action, agreements, and promises"…. "which has been raised or could have been raised." (Sec. Amend. Compl., Ex. 8., § 5.)

There is a lack of clarity. It is not clear as a matter of law whether the Termination IGA or amended Service Plans (not before the Court) eliminated the duties on Headwaters as outlined in the 2003 Master IGA and original Service Plan. It is not clear whether the 2006 and 2008 Master IGAs were separate from the original 2003 Master IGA or were intended to replace or supersede the original 2003 Master IGA. The Termination IGA does not reference the 2003 Master IGA and it is not clear what effect, if any, the Termination IGA and amended Service Plans have on the 2003 Master IGA adopted pursuant to the original Service Plans. The Second Amended Complaint states that the "parties indicated their intent that GRMD should operate independently of Headwaters." (Sec. Amend. Compl., ¶ 31.)

ii. 2008 Granby IGA

In 2008, the Town and Districts, including Headwaters and the Plaintiff, entered into the 2008 Granby IGA. (Sec. Amend. Compl., Ex. 5.) In November 2016, the same parties entered into an "Amended and Restated Intergovernmental Agreement" (the "2016 Granby IGA"). (Sec. Amend. Comp., Ex. 7.) The 2016 Granby IGA notes that the parties previously entered the 2008 Granby IGA, referred to as the "Prior IGA." (Sec. Amend. Compl., Ex. 7, page 2.) The 2016 Granby IGA states: "[t]his Amended and Restated Agreement supersedes and replaces in their entirety the Prior IGA." (Sec. Amend. Compl. Ex. 7, § 1.) As the Plaintiff notes, the parties to the 2008 Granby IGA entered into the 2016 Granby IGA, "replacing the Granby IGA." (Sec. Am. Compl. ¶ 30.)

"The extinguishment of an old contract by the substitution of a new contract or obligation is an original promise known as a novation." Haan v. Traylor, 79 P.3d 114, 116 (Colo. App. 2003). For there to be a novation, there must be: 1) a prior contract or obligation, 2) the parties' agreement to abide by the new contract or obligation, 3) a new contract or obligation, and 4) "the extinguishment of the old obligation by the substitution of the new one." Id. When documents are properly before the court on a C.R.C.P. 12(b)(5) motion to dismiss, as the Second Granby IGA is here, the court should determine the legal effect of documents according to their contents, rather than by allegations in the complaint. Peña, 463 P.3d at 882.

The Plaintiff has failed to state a claim for relief for breach of contract against Headwaters for breach of the 2008 Granby IGA because that agreement was replaced and no longer in effect. Here, the language of the 2016 Granby IGA is unambiguous: the parties, including GRMD, agreed that the 2008 Granby IGA, was superseded and replaced, and the parties agreed to abide by the obligations in the 2016 Granby IGA.

iii. 2016 Granby IGA

In November 2016, the Town and Districts entered into the 2016 Granby IGA. The Plaintiff alleges that the 2016 Granby IGA was not terminated, nor was the authority of the districts to acquire, construct, own, operate, and maintain the Amenities. (Sec. Am. Compl. ¶ 32.)

The 2016 Granby IGA specifically acknowledges that Headwaters and GRMD were formed pursuant to their Service Plans and are authorized to exercise the powers as set forth therein. (Sec. Amend. Compl., Exhibit 7, page 1, Recitals.) Headwaters argues that the 2016 Granby IGA did not impose a duty on it to acquire the Amenities. Here, the 2016 Granby IGA provides that "the Districts," including Headwaters, GRMD, and GRMD Nos. 2-8, "will be authorized to acquire, construct, own, operat[e] and maintain" the Amenities, as outlined in the Service Plans. (Sec. Amend. Compl., Ex. 7, § 5(a).) The Districts were authorized to impose and collect an Amenities Fee to "defray the costs of acquisition, construction, and installation of the Amenities." (Sec. Amend. Compl., Ex. 7, § 5(c).) The parties agreed that the 2016 Granby IGA "may be enforced in law or equity" and that by executing the 2016 Granby IGA, "each of the parties commits itself to perform pursuant" to its terms. (Sec. Amend. Compl., Exh. 7, § 18.) The 2016 Granby IGA repeatedly and extensively references and incorporates the Districts' obligations under the Service Plans.

The Court denies Headwaters' motion to dismiss Count II with respect to the 2003 Master IGA and the 2016 Granby IGA. With respect to the 2003 Master IGA and the 2016 Granby IGA, the Plaintiff has alleged a set of facts sufficient to state a plausible claim for the existence of a contract, that GRMD has performed under the agreements, that Headwaters has breached the agreements, including failure to operate and maintain the Amenities, and that GRMD suffered an injury as a result.

2. The Court grants Headwaters' Motion to Dismiss the Breach of Covenant of Good Faith and Fair Dealing Claim.

The Court grants Headwaters' motion to dismiss the Plaintiff's claim of breach of covenant of good faith and fair dealing.

Having found the Plaintiff is a third-party beneficiary under the more exacting standing analysis required by C.R.C.P. 12(b)(1), the Court determines the Plaintiff has sufficiently satisfied the C.R.C.P. 12(b)(5) regarding pleading third-party beneficiary status.

The Plaintiff asserts Headwaters breached the covenant of good faith and fair dealing, giving rise to a breach of contract claim under the LPA as a third-party beneficiary. The Plaintiff, in paragraph 83 of the Second Amended Complaint alleges Headwaters breached its duty under the 2005 Fee Agreement when "it failed to assert its rights…to acquire the Leased Premises" on behalf of the Plaintiff.

In Colorado, every contract contains an implied duty of good faith and fair dealing. Amoco Oil Co. v. Ervin, 908 P.2d 493, 498 (Colo. 1995). A violation of that duty gives rise to breach of contract claims. McDonald v. Zions First National Bank, N.A., 348 P.3d 957, 967 (Colo. App. 2015) (quoting City of Golden v. Parker, 138 P.3d 285, 292 (Colo. 2006)). This doctrine is used to give effect to the parties' intent and reasonable expectations. Amoco Oil, 908 P.2d at 498. Performance of a contract in good faith requires "'faithfulness to an agreed

common purpose and consistency with the justified expectations of the other party.'" Id. (quoting Wells Fargo Realty Advisors Funding, Inc. v. Uioli, Inc., 872 P.2d 1359, 1363 (Colo.App.1994)).

The covenant of good faith and fair dealing only applies where one party has the discretion to determine the manner of performance of certain contractual terms, such as "quantity, price, or time." Amoco Oil, 908 P.2d at 498; ADT Security Services, Inc. v. Premier Home Protection, Inc., 181 P.3d 288, 293 (Colo. App. 2007). Thus, the covenant of good faith and fair dealing "may be relied upon only when the manner of performance under a specific contract term allows for discretion on the part of either party." Amoco Oil, 908 P.2d at 498. The Colorado Supreme Court has explained that discretionary performance means that one party has the power after the formation of the contract control or dictate the terms or manner of performance because the parties deferred such a decision. Id. When one party has the power to control or determine the terms of performance after contract formation, the other party justifiably expects that the other will act reasonably and in good faith. McDonald, 348 P.3d at 967. When one party uses such discretion regarding performance to "to act dishonestly or outside of accepted commercial practices to deprive the other party of the benefit of the contract, the contract is breached." Id. (quoting Wells Fargo, 872 P.2d at 1363). Stated another way, a party's justified and reasonable expectations regarding performance are violated if the party would not have entered into the contract if it had known of the way the other party would determine "open terms" in its discretion. ADT Sec. Servs., 181 P.3d at 293.

First, the Plaintiff argues, Headwaters breached the covenant "when it failed to assert its rights against [Gray Jay] including its right to acquire the Leased Premises on behalf of GRMD" under the LPA and the 2005 Fee Agreement. (Sec. Am. Compl. ¶ 83.)

The LPA contains an option for Headwaters to purchase the Leased Premises and it spells out exactly what Headwaters must do in order to acquire the Leased Premises, including payment of the purchase price. (Sec. Amend. Compl., Ex. 6, §23.) With respect to the use of the Leased Premises, the LPA states that Headwaters will use the property for the enjoyment of Granby Ranch residents and invitees and provides that Headwaters' failure to operate the Amenities for a 30-day period would be grounds for termination of the lease in GRH's sole discretion. (Sec. Amend. Compl., Ex. 6, §§ 4(a), 10.)

The 2005 Fee Agreement, between Headwaters and GRH and to which Plaintiff was not a party and has not alleged that it was a third-party beneficiary of, establishes the Amenity Fee, grants Priority Access to Granby Ranch owners, establishes payment of the Amenity Fee, criteria for fee increases, collection of the Amenity Fee.

The Second Amended Complaint does not allege either Headwaters or GRH (or its successors in interest) had the "power to set or control the terms of performance after formation" with respect to exercising the option to purchase under either the 2005 Fee Agreement or the LPA. See McDonald, 348 P.3d at 967.

Second, the Plaintiff argues, Headwaters breached the covenant of good faith and fair dealing claim against Headwaters. The Plaintiff alleges that on November 11, 2020, Gray Jay notified Headwaters that it was electing to terminate the LPA pursuant to Section 10. (Sec. Am. Compl., ¶ 40.) The Plaintiff alleges Headwaters continued to operate the Amenities through

contracts with management companies, but "participated in the conspiracy to make it appear as if it were not operating the amenities when in fact it was." (Sec. Am. Compl., ¶¶ 46, 85.)

The LPA provides that if Headwaters ceased to operate the Amenities on the Leased Premises for 30 days or more, GRH could elect to terminate the lease in its discretion. (Sec. Amend. Compl., Ex. 6, § 10; Sec. Amend. Compl., ¶ 41.) The Plaintiff specifically alleges that Headwaters entered into or resolved to enter into contracts with third parties to operate the Amenities. (Sec. Amend. Compl., ¶¶ 44-45.) The Plaintiff alleges Headwaters never ceased to operate the Amenities for a 30-day period and that Headwaters still managed the Amenities through contracts with other entities. (Sec. Amend. Compl., ¶¶ 44-46.) The Second Amended Complaint alleges Headwaters resolved to award a management contract to an entity called Granby Prentice Amenities/Ridgeline and that Headwaters approved an entity called Touchstone Golf as the operating entity for the golf course. (Sec. Amend. Compl., ¶¶ 44-45.)

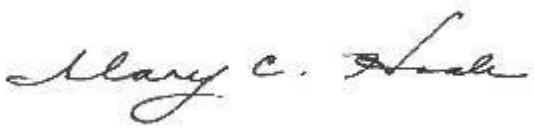
The Second Amended Complaint does not allege that maintenance or operation of the Amenities by Headwaters under the LPA was discretionary or that either Headwaters or GRH (or its successors in interest) had the "power to set or control the terms of performance after formation." See McDonald, 348 P.3d at 967.

The Court dismisses Count VII. Even accepting the Plaintiff's allegations as true and in the light most favorable to it, it has not made factual allegations sufficient to state a plausible claim for relief for breach of the covenant of good faith and fair dealing against Headwaters.

CONCLUSION

The Court partially grants Headwaters' Motion and dismisses Count VII and partially dismisses Count II with respect to the 2008 Granby IGA of Plaintiff's Second Amended Complaint.

SO ORDERED this the 28th day of January, 2022.



Mary C. Hoak, District Court Judge

NOTICE OF APPEAL
(C.A.R. 3(d)(8) APPENDIX)

DATE FILED
May 15, 2025 7:11 PM
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CASE NUMBER: 2025CA894

ATTACHMENT #2

DISTRICT COURT, GRAND COUNTY, COLORADO 307 Moffat Avenue/P.O. Box 192 Hot Sulphur Springs, CO 80451 970-725-3357 **Plaintiff:** GRANBY RANCH METROPOLITAN DISTRICT, a quasi-municipal corporation and political subdivision of the State of Colorado, vs. **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.	DATE FILED January 28, 2022 CASE NUMBER: 2021CV30008 **COURT USE ONLY**
	Case No: 2021CV030008

ORDER GRANTING IN PART GRAY JAY VENTURES, LLC, GRANBY PRENTICE, LLC, AND GR TERRA LLC'S MOTION TO DISMISS SECOND AMENDED COMPLAINT

This matter comes before the Court on Gray Jay Ventures LLC, f/k/a GP Granby Holdings, LLC's ("Gray Jay"), Granby Prentice LLC's ("Granby Prentice") and GR Terra LLC's ("GR Terra")[1] Motion to Dismiss Second Amended Complaint, filed on July 9, 2021. Granby Ranch Metropolitan District ("GRMD") filed its Response on July 30, 2021. The Private Defendants filed their Reply on August 13, 2021. Upon being fully apprised of the facts and law, the Court finds and rules as follows:

[1] Collectively the "Private Defendants."

FACTS

This case involves numerous agreements and fee arrangements for the development, servicing, operation, and financing of Granby Ranch, a golf/ski resort and residential subdivision located in Grand County, Colorado ("Granby Ranch"). Granby Realty Holdings LLC ("GRH")[2] was the developer of Granby Ranch with Redwood Capital Finance Company, LLC ("Redwood Capital") funding the development, secured by a deed of trust (the "2005 Redwood Deed of Trust").

1. Formation of the Districts.

In 2003, GRH sought the organization of two metropolitan districts within Granby Ranch. See C.R.S. § 32-1-101 et seq.[3] The Plaintiff[4] and Headwaters are these two districts (collectively, the "Districts").[5] The Districts were created to finance, manage, and operate services and infrastructure within Granby Ranch. Headwaters was the "Service District" and the Plaintiff was the "Taxing District." (Sec. Amend. Compl., Ex.s 1 and 2 thereto.)

The Plaintiff was delegated "the power to finance public improvements, impose property taxes, and collect revenue or take other actions in cooperation with [Headwaters] that may be necessary to provide the services and facilities needed within the Service Area." The Plaintiff was thus vested with authority to finance and pay for the parks and recreation within the Districts.[6] The Taxing District[7] was tasked with imposing a mill levy to pay the debt obligations incurred by the Districts; to adopt, impose, collect, and remit to Headwaters such rates, fees, tolls and charges as are established by the Service District to fund its administrative and operating expenses; and upon the dissolution of Headwaters, to accept responsibility for the operation and maintenance of any infrastructure located within the Taxing District. (Sec. Amend. Compl., Ex. 2, 2003 Master Intergovernmental Agreement, §§ 5.1, 5.2, 5.4.)

Headwaters, as the Service District, provided the administration and actual improvements, services and facilities within the Districts. According to the 2003 Master IGA[8], Headwaters was considered the "Service District" tasked 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" for the Taxing District. In addition, Headwaters was to "manage and administer all business affairs of the Districts." Headwaters was to own and operate the infrastructure until it was transferred to the Town of Granby or another public agency. Headwaters was also responsible for the construction of the infrastructure and to arrange for its

[2] GRH was originally called Sol Vista Corporation and should not be confused with GP Granby Holdings, LLC.
[3] These service plans were later terminated in 2016.
[4] GRMD was originally called Sol Vista Metropolitan District No. 2.
[5] Headwaters was originally called Sol Vista Metropolitan District No. 1.
[6] In 2007, the Granby Ranch Metropolitan Districts Nos. 2-8 ("GRMD Nos. 2-8")were formed under a Service Plan approved by the Town. These Districts were also considered "taxing districts."
[7] The taxing district eventually became the Plaintiff and GRMD Nos. 2-8.
[8] The 2003 Master Intergovernmental Agreement attached to the Service Plans (the "2003 Master IGA") describes the interrelationship between the two districts and additional descriptions of their assumed roles and responsibilities. The 2003 Master IGA submitted to the Court is unsigned.

financing. (Sec. Amend. Compl., Ex. 2, 2003 Master Intergovernmental Agreement, Part 4, §§ 4.2-4.3.)

At the same time, Headwaters and the Plaintiff entered into an Intergovernmental Agreement with the Town of Granby to reflect responsibilities under the 2003 Master IGA and the Service Agreements (the "2003 Granby IGA") (Sec. Amend. Compl. Ex. 2.).[9] The 2003 Granby IGA was superseded and replaced by the 2008 Intergovernmental Agreement between the Town of Granby, the Plaintiff, Headwaters and GRMD Nos. 2-8 in 2008 (the "2008 Granby IGA") (Sec. Amend. Compl. Ex. 5). The Court addresses the 2008 Granby IGA is more thoroughly below.

2. The 2005 Joint Fee Resolution.

In May 2005, Headwaters and the Plaintiff passed a Joint Resolution to Establish an Amenity Fee (the "2005 Fee Resolution") (Sec. Amend Compl. Ex. 4).[10] According to its terms, Headwaters would impose and collect the Amenity Fee on each lot within the Districts. The Amenities included "certain recreational amenities benefiting the property within the Districts, which include a golf course, ski area, river park and related improvements, trails, and other recreation improvements, facilities, appurtenances, rights-of-way and other amenities as shall from time to time be acquired, constructed and/or operated by the Districts." The Amenity Fee was to provide "a source of funding to pay for the costs incurred by the Districts for the financing, acquisition, construction, installation, and/or replacement of the Amenities, which are generally attributable to the persons subject to such charges, and such fees and charges are necessary to provide for the prosperity and general welfare of the Districts and their inhabitants and for the orderly and uniform administration of the Districts' affairs."

3. The 2005 Amenity Fee Agreement.

In June 2005, GRH and Headwaters executed an Amenity Fee Agreement (the "2005 Fee Agreement") (Headwater's Mot. Dismiss, Ex. 9.) The Plaintiff was not a party to the 2005 Fee Agreement. This agreement imposed a one-time amenity fee of $10,000, collected by Headwaters, per residential unit, with respect to each lot within the Districts. "Headwaters will impose and collect certain fees as set forth in this Agreement (the "Amenity Fee") for the acquisition, financing, leasing, construction, replacement, operation, maintenance and repair of the Amenities…" (Headwater's Mot. Dismiss, Ex. 9, Recitals.) The amenities were the same as those described in the 2005 Fee Resolution.

The purpose of this agreement was to "entitle certain minimum use and enjoyment of the Amenities" to owners and purchasers of homes and homesites within Granby Ranch. GRH authorized certain "priority access" entitlements for which an Amenity Fee had been paid.

[9] The 2003 Granby IGA appears to have been amended in 2005 and again in 2006, but the parties have not provided copies of these amendments to the Court.

[10] The 2005 Fee Resolution was amended on September 6, 2006, and amended and restated on July 17, 2013.

4. The 2008 Granby Intergovernmental Agreement.

The 2008 Granby IGA superseded and replaced the 2003 Granby IGA. The 2008 Granby IGA provided for the Districts and the GRMD Nos. 2-8 "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. Exhibit A to the 2008 Granby IGA more thoroughly describes these amenities." (Sec. Amend. Compl. Ex. 5.) The 2008 Granby IGA recognized the Priority Access given to owners within Granby Ranch, but also stated that "preferred access" be given to the Town of Granby residents who are not owners within Granby Ranch. This amounted to various discounts to access the Amenities.

5. The Leased Premises Agreement.

On December 31, 2012, GRH as "Landlord" and Headwaters as "Tenant" entered into the Second Amended and Restated Lease Purchase Agreement (the "LPA") granting Headwaters the right to use and acquire the Leased Premises, including the ski area, golf course, and improvements thereon. (Sec. Amend. Compl., Ex. 6.)[11] The Amenities described in the 2008 Granby IGA are the same as those leased and to be purchased by Headwaters under the LPA.

Headwaters would fund the rental and potential acquisition with the Amenity Fee, authorized pursuant to the 2005 Fee Resolution and the 2005 Fee Agreement. Annual rent consisted of all Amenity Fees collected by Headwaters each year under the 2005 Fee Agreement (as well as another 2005 fee agreement with a different property owner).

Headwaters and GRH also agreed to a Purchase Price for the Amenities which included all Amenity Fees collected by Headwaters under the 2005 Fee Resolution and the 2005 Fee Agreement. The Amenities were to pass to Headwaters on December 31, 2062 if the Lease had not been terminated in accordance with Section 2(a), and (b) or (c) of the LPA.

6. The 2013 Amended and Restated Joint Resolution.

In July 2013, Headwaters, the Plaintiff, and GRMD Nos. 2 and 8 adopted an Amended and Restated Joint Resolution to establish an amenity fee (the "2013 Fee Resolution") continuing the Amenity Fee imposed on properties and collected by Headwaters. (Headwater's Mot. to Dismiss, Ex. 11.)

7. The 2013 Amenity Fee Agreement.

In July 2013, GRH and Headwaters entered into an Amended and Restated Amenity Fee Agreement (the "2013 Fee Agreement") that superseded and replaced the 2005 Fee Agreement. (Headwaters' Motion to Dismiss, Ex. 10).[12]

[11] The Parties have not provided the Court with the original lease agreement or any of the amendments thereto.
[12] 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. (Headwater's Mot. to Dismiss Ex. 11 §§ 2-3).

8. The 2016 Granby IGA.

On November 8, 2016, the Town of Granby, Headwaters, the Plaintiff, and GRMD Nos. 2-8 amended and restated the 2008 Granby IGA. (the "2016 Granby IGA") (Sec. Amend. Compl., Ex. 7.) An Exhibit A to the 2016 Granby IGA is said to list the Amenities that would be acquired by the Districts. (Id. Para. 5.a.). Exhibit A to the 2016 Granby IGA was not provided to the Court. Section 5.a., however, of the 2016 Granby IGA provides a fairly comprehensive list and states that "in addition to the types of park and recreation services and facilities referenced or reflected in the Service Plans, including the exhibits thereto, the Districts will be authorized to acquire, construct, own, operation and maintain the ski area and lifts, ski lodge, golf courses and appurtenant clubhouses and maintenance facilities, fishing or "river park" facilities and programs, and parks, trails and open space for various recreational purposes as more fully described on Exhibit A, attached hereto and incorporated herein by reference, collectively called the Amenities." These appear to be the same Amenities as those described in the 2008 Granby IGA (i.e., the fishing camp, the golf course, the ski area, and the parks, trails, and recreation areas). The Districts were authorized to continue the collection of the $10,000 Amenities Fee. There is no evidence that the parties have terminated the 2016 Granby IGA, or that it has been amended or restated.

9. Termination of the 2006 and the 2008 Master IGAs.

In November 2017, the Plaintiff, GRMD Nos. 2-8 and Headwaters terminated the 2006 and 2008 Master IGAs (the "Termination IGA"). (Sec. Amend. Compl., Ex. 8.) The parties have not provided the Court with copies of either the 2006 or 2008 Master IGAs.

The Termination IGA 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." The Termination IGA further provided that Headwaters, the Plaintiff, and GRMD Nos. 2-8 have "fully satisfied their obligations under the Master IGAs" and those districts waived any right to pursue claims and damages against each other.

10. GRH's Default and Successors-in-Interest.

At some point, GRH defaulted on its loan obligation with Redwood Capital. In March 2020, Granby Prentice, Redwood Capital's successor and then holder of the 2005 Deed of Trust, initiated a foreclosure action pursuant to C.R.S. § 38-38-101. On August 14, 2020, the Public Trustee conducted a public sale to which Granby Prentice submitted the highest bid. Granby Prentice was issued a Certificate of Purchase for the property and it then assigned that certificate to Gray Jay Ventures ("Gray Jay").

On November 11, 2020, Gray Jay notified Headwaters that it was electing to terminate the LPA pursuant to § 10 because Headwaters had ceased to operate the Amenities for a 30-day period.

On May 5, 2021, GR Terra, LLC ("GR Terra") purchased the property from Gray Jay.

11. Procedural History.

On February 23, 2021, the Plaintiff filed its Complaint against Headwaters and Gray Jay. On April 21, 2021, Gray Jay, and Headwaters both filed motions to dismiss. On July 6, 2021, the Plaintiff filed a Second Amended Complaint. The Second Amended Complaint named Gray Jay, Redwood Capital Finance, Granby Prentice, GR Terra, and Headwaters as Defendants. Claims I, II, III, IV, and V allege breach of contract claims against Gray Jay, Headwaters, Redwood Capital, Granby Prentice and GR Terra respectively. Claim VI alleges tortious interference with the LPA against Gray Jay, Granby Prentice, and Redwood Capital. Claim VII alleges breach of the covenant of good faith and fair dealing in the LPA against Gray Jay and Headwaters. Claim VIII seeks declaratory relief against Gray Jay and GR Terra in the form of a declaration that the LPA was not terminated by the 2020 foreclosure.

On July 9, 2021, Headwaters filed a Motion to Dismiss the Second Amended Complaint. On the same day, GRH, Granby Prentice, and GR Terra filed their own Motion to Dismiss and Granby Prentice filed a Motion to Dismiss Redwood Capital Finance. Granby Prentice, as successor to Redwood Capital Finance, filed a Motion to Dismiss Redwood Capital Finance as to both the Amended Complaint and the Second Amended Complaint.

RULING

I. Standing

The Court first addresses the applicable standard of review as to the issue of standing. While the Private Defendants urges the Court to apply Rule 12(b)(1), the Plaintiff contends that the issue is a 12(b)(5) matter. The distinction is critical because the standards applied to each motion differ. Medina v. State, 35 P.3d 443, 452 (Colo. 2001) (comparing and explaining the two standards). Rule 12(b)(1) motions may require an evidentiary hearing to resolve any factual dispute upon which the existence of jurisdiction may turn. Id.

1. Standard of Review.

A motion to dismiss under C.R.C.P. 12(b)(1) concerns "'the court's authority to deal with the class of cases in which it renders judgment.'" Paine, Webber, Jackson & Curtis, Inc. v. Adams, 718 P.2d 508, 513 (Colo. 1986). Motions challenging a plaintiff's standing are properly brought under Rule 12(b)(1) contesting the trial court's subject matter jurisdiction. Ferguson v. Spalding Rehab., LLC, 2019 COA 93, ¶ 6; 11 Colo. Prac., Civil Procedure Forms & Commentary § 12:4 (3d ed.) (". . . standing is a component of subject matter jurisdiction and is a constitutional prerequisite to maintaining a lawsuit").

Standing is required to invoke the court's jurisdiction. Rocky Mountain Animal Defense v. Colorado Div. of Wildlife, 100 P.3d 508, 513 (Colo. App. 2004). "Standing is a threshold jurisdictional question that must be determined before a case may be decided on the merits."

Defend Colorado v. Polis, 2021 COA 8, ¶ 52; see also Ainscough v. Owens, 90 P.3d 851, 855 (Colo. 2004). Colorado courts provide for broad individual standing. See Ainscough, 90 P.3d at 856 (explaining that Colorado's test for standing "has traditionally been relatively easy to satisfy"). A case, however, must be dismissed where a plaintiff cannot meet the test and criteria for standing. Wimberly v. Ettenberg, 570 P.2d 535, 539 (Colo. 1977).

A motion to dismiss for lack of subject matter jurisdiction does not require the court to apply the same standards as those applied to Rule 12(b)(5) motions. Medina, 35 P.3d at 452 ("whereas Rule 12(b)(5) constrains the court by requiring it to take the plaintiff's allegations as true and draw all inferences in the plaintiff's favor, Rule 12(b)(1) permits the court 'to weigh the evidence and satisfy itself as to the existence of its power to hear the case'"). "In the subject matter jurisdiction context, the court sits as the trier of fact and makes the required findings of fact and conclusions of law as to its jurisdiction." Tabor Found. v. Colorado Department of Health Care Policy & Financing, 2020 COA 156, ¶ fn.3.

The Court declines to conduct a hearing on this issue. Rule 12(b)(1) permits a trial court "to make its own factual findings in determining its subject-matter jurisdiction, it necessarily permits the trial court to hold an evidentiary hearing to resolve any factual dispute upon which the existence of jurisdiction may turn." Medina, 35 P.3d at 452 (citations omitted). The Plaintiff urges this Court to hold such a hearing if the Court chooses to apply the Rule 12(b)(1) standards. However, "if all relevant evidence is presented to the trial court, and the underlying facts are undisputed, the trial court may decide the jurisdictional issue as a matter of law . . . " Id.

The Court disagrees with the Plaintiff's argument that the Court should evaluate the Plaintiff's third-party beneficiary status as one similar to capacity. Capacity is a party's personal right to come into court and generally involves personal qualifications of that party. Currier v. Sutherland, 218 P.3d 709, 712 (Colo. 2009). A third-party beneficiary involves the enforcement of that party's rights under a contract. By definition, it involves a claim or defense. The Plaintiff has not cited any legal authority in which a court addressed a third-party beneficiary's standing as one of capacity, nor has it demonstrated any case law in which a court applied Rule 12(b)(5) standards to a standing claim.

The Plaintiff bears the burden of proving the court's subject matter jurisdiction. Medina, 35 P.3d at 452. The Court is required to dismiss the action "[w]henever it appears by suggestion of the parties or otherwise that the court lacks jurisdiction of the subject matter…" C.R.C.P. 12(h)(3).

2. The Plaintiff is a Third-Party Beneficiary Entitled to Enforce the Terms of the LPA.

The Plaintiff is a third-party beneficiary entitled to enforce the terms of the LPA.

According to the Private Defendants, the Plaintiff lacks standing to enforce the LPA because it was not a party or successor thereto, was not an intended third-party beneficiary, and the surrounding circumstances do not support any other finding. According to the Plaintiff, it is a third-party beneficiary via the structure of the financing and operation of the Districts. It argues that it was one of the parties contemplated and intended to acquire the Leased Premises and was meant to benefit from Headwaters' rental or acquisition thereof.

"[A] plaintiff must satisfy two criteria in order to establish standing. First, the plaintiff must have suffered an injury-in-fact, and second, this harm must have been to a legally protected interest. Ainscough, 90 P.3d at 855 (citations omitted); Wimberly v. Ettenberg, 570 P.2d 535, 539 (Colo. 1977). "An interest is legally protected if the constitution, common law, or a statute, rule, or regulation provides the plaintiff with a claim for relief. A plaintiff establishes an injury in fact by alleging facts that show the defendant caused harm to the plaintiff's legally protected interest." Reeves v. City of Fort Collins, 170 P.3d 850, 851 (Colo. App. 2007); Kolwitz v. City of Boulder, 538 P.2d 482, 483 (Colo. App. 1975) (One seeking standing must have some special interest in the subject of the litigation and not just have a general interest as a resident of a community).

Third-party beneficiaries may be entitled to standing if they meet specific criteria. The individual or entity, not a party to an express contract, may bring an action on the contract if (1) the parties to the agreement intended to benefit that 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, 872 (Colo. 2015). Thus, the inquiry examines whether the plaintiff is an intended or incidental beneficiary to the alleged contract:

> 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.

East Meadows Co. LLC v. Greeley Irr. Co., 66 P.3d 214, (Colo. App. 2003)(citing Concrete Contractors, Inc. v. E.B. Roberts Construction Co., 664 P.2d 722, 725 (Colo. App. 1982)).

Intended third-party beneficiaries are those upon which the contracting parties intended to confer a benefit. Everett v. Dickinson & Co. Inc., 929 P.2d 10, 12 (Colo. App. 1996). The benefit must be direct and not merely incidental. Harwig v. Downey, 56 P.3d 1220, 1221 (Colo. App. 2002); Everett, 929 P.2d at 12 ("[I]it is not enough that some benefit incidental to the performance of the contract may accrue to the third party."). The parties' intent must be apparent from the terms of the contract, in light of all surrounding circumstances. Id.; see also East Meadows Co., LLC v. Greeley Irr. Co., 66 P.3d 214, 217 (Colo. App. 2003) ("[A] person who is not a party to an agreement may enforce a contractual obligation if the promise to be enforced is expressly stated in the contract, or is apparent from the agreement and surrounding circumstances, and the benefit conferred is direct and not incidental."). The question of intent "may be evidenced either from the terms of the agreement, the surrounding circumstances, or both." Villa Sierra Condo. Ass'n v. Field Corp., 878 P.2d 161, 166 (Colo. App. 1994).[13]

[13] Thus, the Court disagrees with the Private Defendants' argument that the Plaintiff lacks standing because the Complaint fails to allege which provision(s) of the LPA allegedly confer a direct benefit on the Plaintiff. The Plaintiff may have standing, despite the absence of a specific provision, if there is evidence that the parties intended to confer a benefit.

Incidental beneficiaries are not entitled to standing. Under Colorado law, "[t]he general rule is that one who is not a party to a contract, and from whom no consideration moved, has no connection therewith. He can avail himself of its terms neither as a cause of action nor a defense.'" East Meadows, 66 P.3d at 217 (quoting Continental Casualty Co. v. Carver, 14 P.2d 181, 183 (Colo. 1932)); Bear Creek Development Corp. v. Genesee Foundation, 919 P.2d 948, 952 (Colo. App. 1996) ("incidental third-party beneficiary to the option contract . . . lacks standing to exercise the option").

This analysis necessarily involves examining the LPA itself. In interpreting a contract, "the primary goal of contract interpretation is to determine and effectuate the intent and reasonable expectations of the parties." Copper Mountain, Inc. v. Industrial Systems, Inc., 208 P.3d 692, 697 (Colo. 2009). The intent of the parties is determined primarily from the contractual language. People ex rel. Rein v. Jacobs, 465 P.3d 1, 11 (Colo. 2020). It may also be evidenced by the circumstances surrounding the contract. Vallagio at Inverness Residential Condominium Association, Inc. v. Metropolitan Homes, Inc., 412 P.3d 709, 718 (Colo. App. 2015). As to the contractual language, the court must give effect to the plain and generally accepted meaning of the contract terms and should be wary of "viewing clauses or phrases in isolation." Copper Mountain, Inc., 208 P.3d at 697. Instead, the Court reads clauses in the context of the entire contract, "seeking to harmonize and to give effect to all provisions so that none will be rendered meaningless." Pepcol Mfg. Co. v. Denver Union Corp., 687 P.2d 1310, 1313 (Colo. 1984). When a contract is unambiguous and complete, courts may conclude that the contractual language expresses the parties' intent and will enforce the terms according to their plain meaning. People ex rel. Rein v. Jacob, 465 P.3d at 11.[14]

The Court notes the LPA does not contain language either expressly creating or disavowing the existence of any third-party beneficiaries. The Court, therefore, examines the contract as a whole and the surrounding circumstances to determine the parties' intent. Jefferson County School Dist. No. R-1 v. Shorey, 826 P.2d 830, 843 (Colo. 1992); Vallagio at Inverness Residential Condo. Ass'n, Inc. v. Metro. Homes, Inc., 412 P.3d 709, 718 (Colo. App. 2015); (parties' intent to confer benefit on third party may be evidenced by the circumstances surrounding the contract); Villa Sierra Condominium Ass'n, 878 P.2d at 166.

The Court finds "surrounding circumstances" to include the Service District Agreements for Headwaters and the Plaintiff, the 2003 Master Agreement,[15] the 2005 Fee Resolution, the 2005 Fee Agreement, and the 2008 Granby IGA. These documents were in force when Headwaters and GRH executed the LPA. These documents also reflect the complex and interrelated relationship between Headwaters and the Plaintiff, as well as the purposes of the dual-district structure.

The Private Defendants' overall argument is that no provision of the LPA manifests an intent to confer specific legal rights on the Plaintiff. The Court disagrees because the LPA specifically references the Plaintiff, and likewise references the agreements and plans just discussed. These agreements outline the Plaintiff's interest and expectation in the Leased Premises/Amenities.

[14] Neither party raises an ambiguity issue.

[15] As previously indicated, the Court does not have copies of any restatements or amendments to the 2003 Master IGA.

The Court finds that the Plaintiff was an intended third-party beneficiary because the LPA appears to reflect a culmination of these different agreements and plans, the for the following reasons.

a. The LPA.

The Plaintiff and the 2005 Resolution and the 2005 Fee Agreement are both specifically described within the LPA. Recital B provides:

> In order to pay rental payments with respect to the Leased Premises and pay the purchase price of the Leased Premises, Tenant has previously adopted, with the Granby Ranch Metropolitan District, a Joint Resolution to Establish an Amenity Fee dated May 26, 2005, as amended September 6, 2006 (as amended from time to time, the "Fee Resolution"), and has entered into that certain Amenity Fee Agreement with Granby Realty Holdings LLC dated as of June 1, 2005, and that certain Aspen Meadows Amenity Fee Agreement with Aspen Meadows Condominiums, LLC dated as of July 5, 2005 (collectively, the "Fee Agreements"), pursuant to which resolution and agreements the Tenant imposes Amenity Fees (as further described herein) on property within the Granby Ranch development ("Granby Ranch") for use of the Leased Premises, as more particularly described therein.

At first blush, the Court was inclined to disregard the recital language as merely prefatory. In Colorado, however, while recitals are not "strictly any part of the contract" and cannot extend contractual stipulations, they may have material influence on the construction of the contract and the determination of the parties' intent." Las Animas Consol. Canal Co. v. Hinderlider, 68 P.2d 564, 566 (Colo. 1937). Section 28(a) of the LPA states that its recitals are to be "incorporated into the covenants of this lease by reference."

The 2005 Fee Resolution and Agreement are especially relevant in determining the parties' intent. The LPA defines the Amenity Fees as those fees "imposed pursuant to the [2005] Fee Resolution and the [2005] Fee Agreements, as the same may be amended or restated from time to time, and any other resolution adopted or agreement entered into for the purpose of imposing fees related to the use of the Leased Premises." (Sec. Amend. Compl. Ex. 6, ¶ 3.a.)

Recital D demonstrates some evidence that the Plaintiff used and benefitted from the Leased Premises. Recital D provides, pursuant to the Headwaters' Service Plan and the 2008 Granby IGA, "the Leased Premises are used by the taxpayers, residents, occupants, visitors, and invitees of Granby Ranch." Section 4(a) of the LPA reaffirms that Headwaters was to use the Leased Premises "for the enjoyment" of the same users. As previously noted, the Plaintiff alleges that it contains the "overwhelming majority" of such taxpayers, residents, and occupants. (Sec. Amend. Compl. ¶ 25.)

The Private Defendant also cite to Paragraphs 28.e. and 28.f. as evidence of an intent not to have any third-party beneficiaries:

> e. 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.

f. 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. This instrument shall not become binding upon the Parties until it shall have been executed and delivered by both Landlord and Tenant.

(Sec. Amend. Compl. Ex. 6.)

The Court finds this language informative but not determinative as to standing. The terms are limited to "the Leased Premises and the provisions of this Lease," which do not necessarily implicate the many other documents at play in this case and discussed below.

i. The District Service Plans and the 2003 Master IGA.

The Districts' service plans provide the why and how each district was to function. The plans are directly related to one another and essentially provide for the financing and operation of "community-wide infrastructure and public facilities and services that will service the [Granby Ranch] Development." The plans describe the dual district structure and detail the "consolidated financial management and operation of the Districts."

As previously discussed, the Plaintiff was authorized to impose a mill levy and collect fees to provide services and facilities to the Districts. (Sec. Amend. Compl. Ex. 2 Part 4, 2003 Master IGA ¶ 5.1, 5.2.) Said services and facilities included "ski areas and/or ski lifts, golf courses … and other recreational facilities, together with all necessary, incidental and appurtenant facilities, land and easements…" (Sec. Amend. Compl., Ex. 2, Part 1, Taxing District Service Plan, ¶ III.C.)

The Service Plan Agreements reflect a symbiotic relationship between the Districts. (See Sec. Amend. Compl., Ex. 1, Sol Vista Metro District No. 1 Service Plan, ¶ IV.A.; Ex. 2, Part 1, Sol Vista Metro District No. 2 Service Plan, ¶ IV.A.). The Taxing District taxed and financed the services and infrastructure that the Service District acquired, constructed, and operated. There isn't any indication in these plans that the two districts were meant to operate independently from one another.

The 2003 Master IGA[16] between Headwaters and the Plaintiff further addresses the interrelationship between the two districts and describes this mutual cooperation. It provides that Headwaters would manage and control the construction and financing of the infrastructure and establish all necessary service charges including the "development fees" for the Plaintiff. (Sec. Amend. Complaint, ¶ 14 and Ex. 2, part 4, Master IGA, Sections 4.2 and 4.3.) "The Service District shall manage and administer all business affairs of the Districts . . . " (Sec. Amend. Complaint, Ex. 2, part 4 Master IGA, Section 4.4.) Headwaters would own and operate the infrastructure until it was transferred to the Town of Granby or another public agency. (Sec.

[16] To the extent that this 2003 Master IGA was terminated per the Termination Agreement, the Court notes that the latter was limited to a termination of the 2006 and 2008 Master IGAs, which have not been submitted to the Court. The Court, therefore, cannot determine as a matter of law whether the Termination Agreement eliminated the interrelated duties between the Districts according to the 2003 Master IGA.

Amend. Complaint, Ex. 2, part 4 Master IGA, Section 4.5.) Lastly, Section 5.4 of the Master IGA provides that "upon receipt of notice and the dissolution of the Service District in accordance with its Service Plan, the Service District shall transfer, and the Tax District shall accept responsibility for the operation and maintenance of any Infrastructure located within the Tax District, which has not been transferred to the Town or another public agency." (Sec. Amend. Complaint, Ex. 2, part 4, Master IGA, Section 5.4.)

The 2003 Master IGA thus indicates that it was never intended for Headwaters to permanently operate and maintain the infrastructure – the Plaintiff had an expectation to do so if services and facilities were not transferred to the Town of Granby or another public agency.

b. The 2005 Fee Resolution between Headwaters and the Plaintiff.

The 2005 Fee Resolution was executed "in the best interests of the Districts to acquire, lease, construct, maintain, provide, operate, and or administer" the Amenities "benefiting the property within the Districts," which included the golf course, ski area, river park and other improvements. (Sec. Amend. Compl. Ex. 4, part 1, Recitals.) It was deemed necessary "to provide for the prosperity and general welfare of the Districts and their inhabitants." Id.

The resolution authorized Headwaters to impose and collect an "Amenity Fee" to fund the Amenities for these purposes. The revenue generated thereby was to be "used solely for the purpose of financing the acquisition, leasing, construction, and replacement of the Amenities" and such "restriction on the use of the Amenity Fee revenues shall be absolute and without qualification." (Sec. Am. Compl., Ex. 4, Part 3, Section 6.) The 2005 Fee Resolution also detailed the priority access to the Amenities given to each residential dwelling unit for which the Amenity Fee had been paid. (Sec. Am. Compl. Ex. 4, Part 1, Section 2.)

The Court notes that none of the Resolution's language limited any of the stated benefits to Headwaters and the Service District alone. Thus, the Resolution evidences an intent to benefit the Plaintiff for any acquisition, lease, and operation of the Amenities within both Districts.[17] Headwaters was to impose and collect a fee to lease, acquire, construct, maintain, operate, or administer the Amenities and it was in the best interests of both districts to do so.

The Court disagrees with the Private Defendants' assessment that only GRH can enforce the 2005 Fee Agreement because the Plaintiff was not a party thereto. The 2005 Fee Resolution authorized Headwaters to enter into the 2005 Fee Agreement. Presumably, Headwaters could not have performed these taxing and financing functions without the Plaintiff's consent (which was a function reserved to the Plaintiff). As alleged by the Plaintiff, "Headwaters is collecting the Amenity Fee through GRMD and pursuant to GRMD's legislative authority pursuant to C.R.S. 32-1-1001(j)(I)." (Sec. Amend. Compl., ¶ 26.) It would be illogical for the Plaintiff to enter into the 2005 Fee Resolution if the Plaintiff would not benefit from the 2005 Fee

[17] The 2013 Amended Fee Resolution affirmed this intention - it was "in the best interests of the Districts, and the property owners, taxpayers, and residents of Districts," to acquire use and ownership of the Amenities. (Headwaters Mot. to Dismiss, Ex. 11 Recitals.)

Agreement or if Headwaters could have imposed and collected the Amenity Fee without adoption of the Resolution.

The Court also disagrees with the Private Defendants' argument that GRH's and Headwaters' decision not to incorporate the 2005 Fee Agreement into the LPA or to designate the Plaintiff as a third-party beneficiary indicates GRH's and Headwaters' intention not to confer a benefit upon the Plaintiff. The 2005 Fee Resolution was specifically referenced in the LPA. (see Recital B, §§ 3.b. and 23.) The Plaintiff was a party to the Resolution and, as previously discussed, the 2005 Fee Resolution appears to have authorized Headwaters to act in the Plaintiff's place by imposing and collecting a fee within the Districts.

The Private Defendants have also not provided any legal authority supporting their position that "only the property owner could agree to subject its property to the amenity fee, and it did that in the 2005 Fee Agreement." The service plan agreements, the 2003 Master IGA, and the 2008 Granby IGA permit the District, not the property owner, through a mill levy, rates, fees, tolls and/or charges, to "finance public improvements, impose property taxes, and collect revenue . . . to provide the services and facilities needed within the Service Area" including for the financing, acquisition, operation of ski areas and/or ski lifts and golf courses. (Sec. Amend. Compl., Ex. 2, Part 1, Sol Vista Metropolitan District No. 2, Taxing District Service Plan, ¶ III.)

Lastly, the Court recognizes that the Developer was not obligated to convey, lease, or otherwise contract for any Amenities under the 2005 Fee Agreement. This has limited bearing on whether the surrounding circumstances reflect an intent to confer a benefit on the Plaintiff. Simply because the Developer was not required to sell does not eliminate the Plaintiff's expected benefit in the event that the Developer did, in fact, convey or lease the Amenities.

c. The 2008 Granby IGA.

The Court finds that the 2008 Granby IGA is a "surrounding circumstance" in the LPA's formation. Along with the 2003 Master IGA, the 2008 Granby IGA reflects the relationship between the Districts, as well as the interplay between Districts and the Town of Granby. It is clear to the Court that the Districts were intended to act reciprocally and for one another's benefit. In fact, the Town and the Districts "determined it to be in the best interests of their respective taxpayers, residents and property owners to enter into this Agreement to promote the coordinated development" of the property. (Sec. Amend. Compl. Ex. 5, Recitals.) The described amenities in the 2008 Granby IGA are the same amenities that were subsequently leased and to be purchased by Headwaters under the LPA.

This cooperation indicates the Plaintiff had an active role and expectation in collection of the Amenity Fee and continued operation of the Amenities/Leased Premises when Headwaters and GRH entered into the LPA. See Villa Sierra Condominium Ass'n, 878 P.2d 161 (condominium association was deemed third-party beneficiary to agreement between the city and developer in which city approved project plans in exchange for future street improvements that were never constructed).

To conclude, for the purpose of standing and given the complex relationship between Headwaters and the Plaintiff, the LPA is viewed in light of the operative agreements at the time of the formation of the LPA. Concrete Contractors, Inc. v. E.B. Roberts Const. Co., 664 P.2d

722, 725 (Colo. App. 1982) (question of intent should be taken from the contract, which should be "construed in the light of the circumstances under which it was made and the apparent purpose the parties were trying to accomplish"). The Districts' Service Plans (as well as the 2003 Master IGA), the 2005 Fee Resolution, the 2005 Fee Agreement, and the 2008 Granby IGA (all operative in 2012 and expressly referenced by the LPA), paint a coherent and consistent picture of their overarching purpose: that the Plaintiff raised revenue for Headwaters to construct, lease, and acquire the Amenities for the use and enjoyment of Granby Ranch residents, taxpayers, and occupants, and that the parties effectuated that intent, in part, through the LPA - the Leased Premises were to be for the use and enjoyment of Granby Ranch residents and invitees, and the LPA was one way that Headwaters fulfilled its obligation to the Plaintiff under these agreements, resolutions, and plans.

The Court finds that, for the purposes of determining subject matter jurisdiction pursuant to CRCP 12(b)(1), that Headwaters and GRH intended to confer a direct benefit on the Plaintiff as a third-party beneficiary.

II. Failure to State a Claim.

The Court partially grants the Private Defendants' motion to dismiss on the grounds that the Plaintiff failed to state a claim upon which the Court can grant relief.

"A C.R.C.P. 12(b)(5) motion to dismiss for failure to state a claim upon which relief can be granted serves as a test of the formal sufficiency of a plaintiff's complaint. The chief function of a complaint is to give a defendant notice of the transaction or occurrence that is the subject of a plaintiff's lawsuit." Public Service Co. of Colorado v. Van Wyk, 27 P.3d 377, 385 (Colo. 2001). A C.R.C.P. 12(b)(5) motion to dismiss is looked upon with disfavor, and a complaint should not be dismissed unless it appears beyond a doubt that a plaintiff can prove no set of facts in support of her claim which would entitle her to relief. A complaint should not be dismissed for failure to state a claim so long as the plaintiff is entitled to some relief upon any theory of the law. Id. at 385-386 (citations omitted).

In Warne v. Hall, 373 P.3d 588 (Colo. 2016), the Colorado Supreme Court adopted the federal plausibility standard for a motion to dismiss, which is a shift from prior precedent.

> To survive a motion to dismiss, a complaint must contain sufficient factual matter, accepted as true, to state a claim to relief that is plausible on its face. A claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged. The plausibility standard is not akin to a probability requirement, but it asks for more than a sheer possibility that a defendant has acted unlawfully. Where a complaint pleads facts that are merely consistent with a defendant's liability, it stops short of the line between possibility and plausibility of entitlement to relief. (internal quotation marks and citations omitted).

Ashcroft v. Iqbal, 556 U.S. 662, 678 (2009). Conclusory allegations are insufficient to state a plausible claim for relief. Coyle v. State, 492 P.3d 366, 371 (Colo. App. 2021). The Court is not required to accept as true legal conclusions couched as factual

allegations and a complaint may be dismissed if the substantive law does not support the claims asserted. Western Innovations, Inc. v. Sonitrol Corp., 187 P.3d 1155, 1158 (Colo. App. 2008).

A court may consider only the facts alleged in the complaint, documents attached as exhibits or referenced in the complaint, and matters of which the court may take judicial notice, such as public records. Walker v. Van Laningham, 148 P.3d 391, 397 (Colo. App. 2006) (discussing judicial notice); Yadon v. Lowry, 126 P.3d 332, 336 (Colo. App. 2005) (discussing documents attached or referenced in the complaint); Pena v. Am. Family Mut. Ins. Co., 2018 COA 56, ¶ 14. When documents are presented to the court in a motion to dismiss, the legal effect of the document is determined by their contents rather than by the allegations as stated in the complaint. Peña, 463 P.3d at ¶ 15; Stauffer v. Stegemann, 165 P.3d 713, 716 (Colo. App. 2006). In considering documents attached or referenced in a complaint, "a trial court is not required to accept legal conclusions or factual claims at variance with the express terms of the document attached to the complaint." Stauffer, 165 P.3d at 716.

"A document that is referred to in the complaint, even though not formally incorporated by reference or attached to the complaint, is not considered a 'matter outside the pleading.'" Yadon, 126 P.3d at 336. If that document "is central to the plaintiff's claim, the defendant may submit an authentic copy to the court to be considered on a motion to dismiss, and the court's consideration of the document does not require conversion of the motion to one for summary judgment." Id. (quoting James Wm. Moore et al., Moore's Federal Practice § 56.30[4], at 56–225 & –226 (3d ed.2005)).

Conversion is required, however, if matters are submitted in a motion to dismiss are outside of these described situations. Bristol Bay Productions, LLC v. Lampack, 2013 CO 60, ¶ 46; Churchey v. Adolph Coors Co., 759 P.2d 1336, 1339 (Colo.1988) ("Because [defendant] attached affidavits and exhibits to its motion, the court properly treated [defendant's] motion as one for summary judgment."); Garcia v. Centura Health Corp., 2020 COA 38, ¶ 50 (motion to dismiss properly treated as motion for summary judgment where defendant attached affidavits and exhibits to its motion and the district court considered these attachments in its order).

The Plaintiff attached the following exhibits to its Second Amended Complaint:[18]

- The 2003 Sol Vista Metro District No. 1 Service Plan and exhibits attached thereto (Exhibits A1-A2, B1-B2, C, D, E, and F – which include the 2003 IGA and the 2003 Master IGA);
- the 2003 Sol Vista Metro District No. 2 Service Plan and exhibits attached thereto (Exhibits A1-A2, B1-B2, C, D, E, and F - which include the 2003 IGA and the 2003 Master IGA);
- the 2007 Consolidated Service Plan for GRSD Nos. 2-8 and exhibits attached thereto (Exhibits A, B, C1, C2, D, and E);
- the 2005 Fee Resolution;
- the 2008 IGA;

[18] These are the same exhibits that were attached to the Amended Complaint.

- the LPA;
- the 2016 IGA; and
- the 2017 Termination IGA.

The Private Defendants did not submit any exhibits to their motion. Instead, the Private Defendants refer to documents attached to Headwater's Motion to Dismiss. These include Exhibits 9-12 to Headwater's motion:

- the 2005 Fee Agreement;
- the 2013 Amended and Restated Amenity Fee Agreement;
- the 2013 Amended and Restated Amenity Fee Joint Resolution; and
- a Motion for Order of Exclusion of Property from the Plaintiff's District.

Although none of these documents are authenticated, an authentic copy is not required (and conversion unnecessary) where the plaintiff refers to and relies upon that document and does not dispute its authenticity. See Yadon, 126 P.3d at 336. Here, the Plaintiff does not dispute authenticity and refers to the 2005 Fee Agreement in the Amended and Second Amended Complaint (Sec. Amend. Compl. ¶¶23-24, 75, 83.) The Plaintiff does not submit any exhibits or affidavits of its own in Response to the Private Defendants' Motion to Dismiss. Most importantly, the Court does not rely on any of Headwaters'/the Private Defendants' exhibits, other than the 2005 Fee Agreement, in this order.

Conversion is unnecessary. "[I]f matters outside of the complaint are submitted to the trial court, but not considered in review of the [Rule] 12(b)(5) motion to dismiss, the trial court need not convert the motion to dismiss into a motion for summary judgment." Pub. Serv. Co. of Colo. v. Van Wyk, 27 P.3d 377, 386 (Colo. 2001).

Having found the Plaintiff is a third-party beneficiary under C.R.C.P. 12(b)(1), the Court examines whether the Plaintiff has sufficiently satisfied the C.R.C.P. 12(b)(5) standards regarding pleading third-party beneficiary status as to the claims for breach of contract and breach of the covenant of good faith and fair dealing.

The Court addresses the declaratory judgment claim first.

1. The Court Denies the Private Defendants' Motion To Dismiss the Declaratory Judgment Claim Because the Plaintiff Alleges that the LPA is a Covenant Running with the Land, Which is not Necessarily Extinguished by Foreclosure (Claim VIII).

The Court denies the Private Defendants' motion to dismiss the declaratory judgment claim because the Plaintiff Alleges the LPA is a covenant running with the land, which is not necessarily extinguished by foreclosure (Claim VIII).

The Private Defendants argue that the foreclosure of the Leased Premises extinguished the LPA before any of the Private Defendants acquired title, thereby absolving them from liability. The Plaintiff maintains that the LPA is a covenant running with the land which cannot be not extinguished by foreclosure. The Plaintiff also argues the LPA is an installment land contract, which can only be foreclosed through the courts. As such, the Plaintiff contends that Gray Jay

and GR Terra are bound as successors in interest to the LPA. GP Prentice is not a defendant as to this claim.

a. Covenants that Run with the Land.

Real covenants, as opposed to personal covenants, "run with the land" and are binding on the parties' successors in interest, as well as the parties themselves. Reishus v. Bullmasters, LLC, 2016 COA 82, ¶¶ 36-38. In order for a covenant to run with the land, there must first be an intent by the parties to the covenant that it do so. Cloud v. Association of Owners, Satellite Apartment Bldg., Inc., 857 P.2d 435, 440 (Colo. App. 1992).

Here, the LPA states that "[t]his 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." (Sec. Amend. Compl., Exh. 6, Section 28.f.) Colorado courts have found similar terms indicative of the parties' intent to create covenants that run with the land. See Lookout Mountain Paradise Hills Homeowners' Ass'n v. Viewpoint Associates, 867 P.2d 70, 74 (Colo. App. 1993); Reishus, 2016 COA 82, ¶ 43; Cloud, 857 P.2d at 440.

A covenant in a lease, however, will run with the land "only where the act covenanted to be done or omitted concerns the land or the estate conveyed as where it affects the use, condition, value, and enjoyment of the premises." 52 C.J.S. Landlord & Tenant § 458. Thus, even when there is expressed intent for a covenant to run with the land, the covenant must still "'touch and concern'" the land, that is, the covenant must closely relate to the land, its use, or its enjoyment. Cloud, 857 P.2d at 440. "Whether a covenant runs with the land turns on the construction of relevant documents." Lookout Mountain, 867 P.2d at 74. The Court reads the covenant as a whole, and gives effect to all provisions, to make this determination. Reishus, 2016 COA 82, ¶ 38; Lookout Mountain, 867 P.2d at 75.

The Court finds the Plaintiff properly stated a claim that the LPA is a covenant running with the land because the Leased Premises touch and concern the land.

The Leased Premises are defined by the LPA as the combined "Real Estate" and "Improvements." (Sec. Amend. Comp., Exh. 6, page 2.) They include the ski area and golf course, as well as all buildings (with the exception of the third floor of the Base Camp Lodge), the ski shop, golf course clubhouse, ranch house, golf course maintenance shop, and several other improvements. Id. The "Amenities" are defined as the "ski area and golf portions of the Leased Premises." Id. at page 1. According to the specific language of the LPA "the Amenities are expected to entirely or largely be the same as the Leased Premises." Id. at page 2.

Recital B of the LPA describes the Amenity Fee used to pay for the Leased Premises and Recital D describes the users of the Leased Premises. Recital B references the 2005 Fee Resolution and Recital D references the Service District Service Plan and the 2008 Granby IGA. (Sec. Amend. Compl., Ex. 6, page 1.) These referred-to documents define "Amenities" as the recreational amenities that encompass the land itself (for example, the ski area, golf course, and river park). Id.

Terms of the LPA demonstrate the LPA touches and concerns the land. Section 4.a. of the LPA further provides: "The Leased Premises are being used by Tenant for the enjoyment of the taxpayers, residents, occupants, visitors and invitees of Granby Ranch. The Parties acknowledge and agree that (i) the Tenant shall be entitled to acquire the Leased Premises at the end of the last

Renewal Term (or earlier as provided in Section 23) …" (Sec. Amend. Compl., Exhibit 6, p. 4.) Section 8.a. states that Headwaters may make "substitutions and non-structural and structural alterations and additions (including without limitation minor boundary adjustments) to the Leased Premises . . . " provided that they be of "such character as not to diminish the structural integrity of the Leased Premises, shall not violate applicable law, shall be subject to design review board approval, where applicable . . ."

Importantly, Section 13.a. of the LPA states that "Landlord covenants, represents and warrants to Tenant as follows: . . . that upon Tenant keeping and performing the agreements and obligations of this Lease on its part to be kept and performed, Tenant shall have peaceful and uninterrupted possession of the entire Leased Premises during the Term of this Lease, and the right to acquire the Leased Premises in accordance with Section 23 hereof." This also is evidence of a covenant running with the land. See 52 C.J.S. Landlord & Tenant § 544 ("covenants to pay rent or to repair and return the premises in good condition are examples of covenants that run with the land").

Section 21 of the LPA acknowledges that GRH had the right to convey its interest in the Leased Premises to any other person or entity and that in such an event Headwaters would have no rental payment obligation to the new owner until it had been notified of the conveyance. (Sec. Amend. Compl., Ex. 6, §21.) Section 21 expresses an intent that any successor to the Landlord had continued rights and responsibilities to Headwaters. Id.

These combined terms reflect that the LPA contains covenants running with the land. The LPA, the 2005 Fee Resolution, and the 2008 Granby IGA detail the location and structure types of the Amenities/Leased Premises. Importantly, the covenants in the LPA benefitted Headwaters by reason of it being the Service District for the Leased Premises/Amenities located within a common scheme of development. These provisions are closely tied with the use, possession, and enjoyment of Granby Ranch. See Lookout Mountain, 867 P.2d at 74–75. Furthermore, the LPA may create a possessory interest in Headwaters by 2062. Thus, the Plaintiff has properly alleged that the parties intended for the LPA to touch and concern the land.

Lastly, the Court disagrees with the Private Defendants that foreclosure of the 2005 Redwood Capital Deed of Trust extinguished any covenant running with the land as a matter of law. Colorado law provides that a purchaser of property at a foreclosure sale obtains a deed to the property after the redemption period expires and that "upon the issuance and delivery of such deed ... title shall vest in the grantee and such title shall be free and clear of all liens and encumbrances recorded or filed subsequent to the recording or filing of the lien on which the sale referred to in this section was based." First Interstate Bank v. Tanktech, Inc., 864 P.2d 116, 119 (Colo. 1993); C.R.S. § 38-38-501(1) (subject to rights to cure and redeem, title vests in in the property free and clear of all liens and encumbrances junior to the lien foreclosed). The Private Defendants, however, have not cited any cases involving foreclosure under Section 501 and the extinguishment of covenant that runs with the land.

Absent legal authority to the contrary, a covenant running with the land is not necessarily extinguished by foreclosure and thus, the Plaintiff properly states a claim for relief. Top Rail Ranch Estates, LLC v. Walker, 2014 COA 9, ¶ 21 (covenants in deed of trust were not extinguished by foreclosure); Schwab v. Martin, 441 P.2d 17, 19 (Colo. 1968) (despite foreclosure, the right to appoint a receiver under the deed of trust remained an operative as a contract between the parties).

Thus, the Court finds the Plaintiff has pled factual content from which this Court draws the reasonable inference that a contractual obligation, i.e. a real covenant, binds the successors in interest to the LPA. Warne, 373 P.3d at 596.

b. Installment Land Contract.

The next question is whether the 2005 Redwood Capital Deed of Trust foreclosure extinguished the LPA, if it is an installment land contract.

An installment land contract is a secured financing arrangement where "the vendee is the owner in equity of the land, and the seller merely holds legal title as security for the payment of the purchase price." Sleeping Indian Ranch, Inc., v. West Ridge Group, 119 P.3d 1062, 1068 (Colo. 2005). The vendee thus assumes the rights and responsibilities of ownership and possession of the realty. Id.

Installment land contracts are characterized by: (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. 2 Colo. Prac., Methods Of Practice § 61:8 (7th ed.) Without these hallmarks indicating a meeting of the minds and mutual asset on the sale and purchase of property, there can be no contract. See Brush Creek Airport, LLC v. Avion Park, LLC, 57 P.3d 738, 745 (Colo. App. 2002). The LPA must be construed as a whole; "its language examined in harmony with the plain meaning of the words." Bernhardt v. Hemphill, 878 P.2d 107, 110 (Colo. App. 1994).

The parties did not act as though they executed an installment land contract. Real property contracts require the parties to designate the public trustee as an escrow agent for property taxes and that, within 90 days of signing, the seller to file a notice of transfer. C.R.S. § 38-35-126(1)(a) and (2). Contracts for deed to real property include installment land contracts. C.R.S. § 38–35–126(1)(b). The Plaintiff does not allege such designation and the LPA does require the parties to so designate.

Additionally, the LPA described Headwaters' payments to GRH as "Rental Payments," not "installment payments." (Sec. Am. Compl., Ex. 6, § 3.a.) These Rental Payments were not fixed and would "fluctuate greatly from month to month and year to year." (Sec. Am. Compl., Ex. 6, § 3.b.) The parties agreed that the "the obligation of the Tenant to pay Rental Payments hereunder constitutes a current obligation of the Tenant payable exclusively from current and legally available funds and shall not in any way be construed to be an indebtedness or multiple fiscal-year obligation of the Tenant within the meaning of the provision of any constitutional or statutory limitation or requirement applicable to the Tenant. The Tenant has not hereby pledged the credit of the Tenant to the payment of the Rental Payments, which amounts are payable solely from the Amenity Fees, if and when received." (Sec. Am. Compl., Ex. 6, § 3.c.)

These terms, and the absence of a C.R.S. § 38-35-126 notice, lead the Court to conclude that the LPA was not an installment land contract. A critical element of an installment land contract is that the vendee "is the owner in equity of the land, and the seller merely holds legal title as security for the payment of the purchase price." (emphasis added) Sleeping Indian

Ranch, Inc.,119 P.3d at 1068; see also Alien, Inc. v. Futterman, 924 P.2d 1063, 1070 (Colo. App. 1995) ("To constitute a mortgage, equitable or otherwise, a conveyance of property must be meant to secure the payment of an underlying debt or obligation"). Here, the parties specifically contracted that there was no indebtedness or pledge of credit by Headwaters. "[W]hether an installment land contract is to be treated as a mortgage is committed to the sound discretion of the trial court, based upon the facts presented." Grombone v. Krekel, 754 P.2d 777, 778 (Colo. App. 1988).

If the contract in question was an installment land contract, however, Colorado recognizes that an installment land contract may be treated as an equitable mortgage and thus subject to judicial foreclosure, depending on certain factors: the amount of the buyer's equity in the property; the length of the default period and number of defaults; whether the buyer abandoned the property; the amount of the monthly payments in relation to the rental value of the property, the willfulness of the default; whether the buyers made improvements to the property, and whether the property had been adequately maintained. Woods v. Monticello Development Co., 656 P.2d 1324, 1326 (Colo. App. 1982) (citations omitted); Grombone, 754 P.2d at 779. Thus, equitable redemption is not required in every case where the buyer has acquired an equitable interest in property under a land sale contract. It is simply "one of the 'permissible' remedies for a buyer's default under an installment land contract." Woods, 656 P.2d at 1326.

Colorado also provides for statutory foreclosure of an installment land contract. This statute was meant to "codify previously existing equitable rights of redemption that were recognized to exist by courts of equity." Paraguay Place-View Trust v. Gray, 981 P.2d 681, 683 (Colo. App. 1999). Vendees have statutory redemptive rights when a senior deed of trust is foreclosed. C.R.S.§ 38–38–305(3) provides that "an installment land contract vendee of property … shall be considered an owner … and such vendee shall be subject to all requirements in this article with respect to owners." This gives the vendee "the *preferential* redemption rights that a title owner has under part 3 of article 38, again, for example, as when a senior deed of trust is foreclosed." Paraguay Place-View, 981 P.2d at 683 (italics in original).

Upon the expiration of redemption periods, or, if there are no redemption periods, eight business days thereafter, title to the property sold will vest in the holder of the certificate of purchase. C.R.S. § 38-38-501(1). "Subject to the right to cure and the right to redeem provisions of section 38-38-506 and subject to the provisions of section 38-41-212(2), such title shall be free and clear of all liens and encumbrances junior to the lien foreclosed." Id.

The Plaintiff does not allege that Headwaters was a vendee under the LPA; nor does it allege that Headwaters exercised its statutory cure or redemption rights. Thus, even if the LPA was an installment land contract, Headwaters abandoned any rights thereunder. The Plaintiff also does not allege that it attempted to cure or redeem under part 3 of article 38. Likewise, it has not cited any legal authority permitting a third-party beneficiary in general, who holds no security interest, to cure or redeem. Lastly, it has not provided the Court with any legal authority that judicial foreclosure of an equitable mortgage is required as a matter of law. The existence of C.R.S. § 38-38-501(1) suggests otherwise.

The Court finds that any security interest Headwaters had under the LPA was extinguished by foreclosure pursuant to C.R.S. § 38-38-501 as a junior lien because the 2005 Redwood Deed of Trust was senior to the LPA. See First Interstate Bank v. Tanktech, Inc., 864 P.2d 116, 119

(Colo. 1993) (". . . upon foreclosure of a senior security interest, any subordinate leases, liens or encumbrances are extinguished once the redemption period has expired . . ."); Town of Grand Lake v. Lanzi, 937 P.2d 785, 788 (Colo. App. 1996). Any contractual rights or interests that touched and concerned the land, however, continued in force after the foreclosure. See Top Rail Ranch Estates, LLC v. Walker, 2014 COA 9, ¶ 21 (covenants in deed of trust were not extinguished by foreclosure); Schwab v. Martin, 441 P.2d 17, 19 (Colo. 1968) (provision of a deed of trust remained operative as a contract between the parties, even though foreclosure extinguished the debt).

2. The Court Denies the Private Defendant's Motion to Dismiss the Breach of Contract Claims.

The Court denies the Private Defendants' motion to dismiss the breach of contract claims.

According to the Plaintiff, Gray Jay breached its duties to the Plaintiff, pursuant to the LPA and the Subordination, Non-Disturbance, and Attornment Agreement referenced in the LPA, when Gray Jay refused "to act as Landlord and accept the purchase provisions of the LPA."[19] The Plaintiff alleges that GR Terra breached the LPA, but not the subordination agreement.

The Private Defendants seek dismissal of this claim because (a) the Plaintiff has failed to properly plead a condition precedent under C.R.C.P. 9(c); (b) the LPA is a junior lien that was extinguished by the 2005 Redwood Deed of Trust; (c) there are no allegations that a subordination, non-disturbance, and attornment agreement was recorded; and (c) the Plaintiff has failed to allege any grounds for monetary damages against Gray Jay or GR Terra.

To prevail on a breach of contract claim, a plaintiff must prove: (1) the existence of a contract, (2) that it performed their contractual duties or a justification for nonperformance of contractual duties, (3) that the other party to the contract failed to perform, and (4) damages resulted. Long v. Cordain, 343 P.3d 1061, 1067 (Colo. App. 2014).

a. Gray Jay (Claims I and V).

The Court denies the Private Defendants' motion to dismiss the Plaintiff's Claims I and V.

[19] Specifically, the Plaintiff cites to Sections 13 and 26 of the LPA. Section 13(b) provides that "[t]he Parties acknowledge that the Leased Premises are currently subject to the Deed of Trust, which is prior and superior to this Lease, and that, in 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. 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. 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." (Sec. Amend. Compl. Ex. 6 Section 13(b) (underline added). Section 26 provides that "[u]pon 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 and which shall provide, among other things, that upon such lender's succession of interest it shall be bound as Landlord to the provisions of this Lease, including the Tenant's right to acquire the Leased Premises in accordance with Section 23 hereof. Such instrument will be completed by Tenant and delivered to Landlord within 10 days of the date requested." (Sec. Amend. Compl., Ex. 6, Section 26.)

The Court agrees that the Plaintiff failed to properly plead a condition precedent under Rule 9(c) when it alleged an assumption that a subordination agreement had been executed, rather than the occurrence of the event. "In pleading the performance or occurrence of a condition precedent, it is sufficient to aver generally that all conditions precedent have been performed or have occurred." Colorado Rule of Civil Procedure 9(c). Failure, however, to properly plead does not automatically dispense with the claim. See Bardill v. Owners Insurance Company, 2019 WL 4744789, at *6, fn 3 (D. Colo. Sept. 30, 2019) (failure to meet condition precedent to contract is an affirmative defense not to be considered in a motion to dismiss).

The Court also agrees that any subordination, non-disturbance, and attornment agreement is an unrecorded document referenced in the LPA and cannot, as a matter of law, bind successors thereto. C.R.S. § 38-35-108 provides that

> When a deed or any other instrument in writing affecting title to real property has been recorded and such deed or other instrument contains a recitation of or reference to some other instrument purporting to affect title to said real property, such recitation or reference shall bind only the parties to the instrument and shall not be notice to any other person whatsoever unless the instrument mentioned or referred to in the recital is of record in the county where the real property is situated.

The Plaintiff does not allege that any subordination, non-disturbance, and attornment agreement was recorded. The Plaintiff does not allege that it was executed. The Plaintiff also does not allege that Gray Jay had actual notice of this agreement. See Page v. Fees-Krey, Inc., 617 P.2d 1188 (Colo. 1980) (constructive notice of a reservation of royalty interest is binding, even though the reservation is not part of a recorded document). The Plaintiff simply contends the LPA is evidence that the agreement was actually executed. (See Sec. Amend. Compl., Exh. 6, Section 13(b) and 26). While the Plaintiff argues that the LPA's acknowledgments are "direct evidence" that Redwood's successors would be bound by such agreement, it has not cited any legal authority to support this argument and this insufficient per the statute. As such, any subordination, non-disturbance, and attornment agreement would have bound only Headwaters and GRH, not the Private Defendants, and cannot be relied upon by the Plaintiff to enforce the provisions of the LPA.

The Court also agrees with the Private Defendants that, assuming the LPA survived the foreclosure, the Plaintiff has failed to properly plead performance. For the Plaintiff to succeed with its claim, it must allege that it or Headwaters performed its contractual duties or justify its (or Headwater's) nonperformance of contractual duties. Long, 343 P.3d at 1067. The Plaintiff has not pled that Headwaters exercised its option to purchase the Property or tendered the purchase price set forth in the LPA.

As previously discussed, however, the Plaintiff properly states a claim for a covenant running with the land. Covenants are construed like contracts "'seeking to harmonize and to give effect to all provisions so that none will be rendered meaningless.'" Pulte Home Corporation, Inc. v. Countryside Community Association, Inc., 2016 CO 64, ¶ 23. "A covenant is in the nature of a contract and when a covenant is breached, it confers the same right of action as any other contract." 21 C.J.S. Covenants § 66 (2021).

Because the Court may dismiss a complaint only when "it appears beyond a doubt that a plaintiff can prove *no* set of facts in support of her claim which would entitle her to relief," the

Court finds that the Plaintiff has pled enough factual content to allow the Court to draw the reasonable inference that Gray Jay has breached the covenants of the LPA, despite the Plaintiff's failure to allege that it has performed its contractual duties.

Lastly, the Court disagrees with the Private Defendants that Section 3.a. of the LPA precludes the Plaintiff's claim. "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. (Sec. Amend. Compl., Exh. 6, § 3.a) Notably absent from this section is the word "claim." The Plaintiff seeks damages and specific performance. The Plaintiff's claims are not in response to any recovery effort. The Court finds that Section 3.a. does not defeat the breach of contract claim.

The Private Defendants raise the same arguments for GR Terra as they do for Gray Jay. For the same reasons as stated above, the Court denies the motion to dismiss the breach of contract claim against GR Terra.

b. Granby Prentice and GR Terra (Claim IV).

The Court denies the Private Defendants' motion to dismiss Claim IV.

The Private Defendants argue Granby Prentice was never a party to the LPA, never took title to the Leased Premises, and thus cannot be in breach thereof. The Private Defendants further contend that even if Granby Prentice did take title, the Plaintiff failed to allege any facts that would give rise to a breach of the LPA.

The Court disagrees.

The Plaintiff alleges that the 2005 Redwood Capital Deed of Trust was transferred to Granby Prentice, LLC and that Granby Prentice initiated foreclosure proceedings against GRH. It is alleged that Granby Prentice was the highest and only bid at the sale, the Public Trustee issued a Certificate of Purchase for the property to Granby Prentice, who then assigned this Certificate of Purchase to GPGH (aka Gray Jay).

There is a dispute as to which entity was the holder of the certificate of purchase after expiration of the redemption period. The Court is also unaware as to the applicable redemption period applied to the foreclosure.

As such, the Private Defendants have not convinced the Court that the Plaintiff's claim against Granby Prentice fails as a matter of law. The Plaintiff has plausibly alleged sufficient facts to demonstrate that Granby Prentice was the holder of the certificate of purchase when title to the property vested, subjecting it to the covenants of the LPA.

3. The Plaintiff's Tortious Interference with Contract Claim Against Gray Jay and Granby Prentice Fails as A Matter of Law Because a Party Cannot Tortiously Interfere With its Own Contract (Claim VI).

The Plaintiff's tortious interference with contract claim against Gray Jay and Granby Prentice fails as a matter of law because a party cannot tortiously interfere with its own contract.

A claim of tortious interference with contract requires 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, 912 (Colo. App. 1991).

The Plaintiff's allegation is based on Gray Jay's November 2020 notification to Headwaters that it was terminating the LPA under § 10 based upon Headwaters' failure to operate the Amenities in accordance with the LPA. (Sec. Amend. Compl. ¶ 40-41.)

The Private Defendants argue that, as a successor to the LPA, they are not subject to liability because "a defendant cannot be liable for interference with its own contract." MDM Group Associates v. CX Reinsurance Co. Ltd., 165 P.3d 882, 886 (Colo. App. 2007). A claim for tortious interference applies only when one, not a party to the contract, induces a third party to breach the contract, or interferes with the third party's performance of the contract. Colorado Nat. Bank of Denver v. Friedman, 846 P.2d 159, 170 (Colo. 1993). "[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.

The Plaintiff has not provided any authority that a successor-in-interest is a third-party for purposes of this claim. Compare Francis Hospitality, Inc. v. Read Properties, LLC, 820 S.E.2d 607, 610-611 (Va. 2018) (landlord's successor in interest cannot be held liable for tortiously interfering with its predecessor's contract); Bhole, Inc. v. Shore Investments, Inc., 67 A.3d 444 (Del. 2013) (no liability for successor tenant on same basis); U.S. v. Newbury Mfg. Co., 36 F. Supp. 602, 606 (D. Mass. 1941) (tortious interference with contract cannot be applied where successor corporation is employed by its predecessor as an instrumentality by which the latter proceeds to violate its contract).

The Court finds that the Plaintiff's claim for tortious interference with contract fails because Gray Jay is GRH's successor in interest and thus the LPA was its own contract.

The Court dismisses Claim VI in its entirety. As to Granby Prentice, there are no allegations that it took any action to interfere with the LPA under Section 10 or otherwise. The claim against Granby Prentice also fails as a matter of law.

4. The Plaintiff's Claim for Breach of the Covenant of Good Faith and Fair Dealing Fails as a Matter of Law (Claim VII).

The Plaintiff's claim for breach of the covenant to good faith and fair dealing fails as a matter of law (Claim VII).

The Plaintiff 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."

In Colorado, every contract contains an implied duty of good faith and fair dealing. Amoco Oil Co. v. Ervin, 908 P.2d 493, 498 (Colo. 1995). A violation of that duty gives rise to breach of contract claims. McDonald v. Zions First National Bank, N.A., 348 P.3d 957, 967 (Colo. App. 2015) (quoting City of Golden v. Parker, 138 P.3d 285, 292 (Colo. 2006)). This doctrine is used to give effect to the parties' intent and reasonable expectations. Amoco Oil, 908 P.2d at 498. Performance of a contract in good faith requires "'faithfulness to an agreed common purpose and consistency with the justified expectations of the other party.'" Id. (quoting Wells Fargo Realty Advisors Funding, Inc. v. Uioli, Inc., 872 P.2d 1359, 1363 (Colo. App. 1994)).

The covenant of good faith and fair dealing applies only where one party has discretion to determine the manner of performance of certain contractual terms, such as "quantity, price, and time." Amoco Oil, 908 P.2d at 498; ADT Security Services, Inc. v. Premier Home Protection, Inc., 181 P.3d 288, 293 (Colo. App. 2007). Thus, the covenant of good faith and fair dealing "may be relied upon only when the manner of performance under a specific contract term allows for discretion on the part of either party." Amoco Oil, 908 P.2d at 498. The Colorado Supreme Court has explained that discretionary performance means that one party has the power, after the formation of the contract, to control or dictate the terms or manner of performance because the parties deferred such a decision. Id. When one party uses discretion to "act dishonestly or outside of accepted commercial practices to deprive the other party of the benefit of the contract, the contract is breached." McDonald, 348 P.3d at 967 (quoting Wells Fargo, 872 P.2d at 1363). Stated another way, a party's justified and reasonable expectations regarding discretionary performance are violated if the party would not have entered into the contract if it had known of the way the other party would determine "open terms." ADT Sec. Servs., 181 P.3d at 293.

The Plaintiff alleges that Gray Jay, as successor to Redwood Capital and pursuant to Sections 13 and 26 of the LPA, "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 Plaintiff does not allege any discretionary authority exercised by Gray Jay (or GRH) as to the LPA, only that Gray Jay, as successor, breached its duties when it failed to act as landlord or honor the acquisition. There is no allegation that Headwaters ever sought to acquire the Leased Premises. More importantly, there is no allegation that Gray Jay (or GRH) had the "'power to set or control the terms of performance after formation.'" See McDonald, 348 P.3d at 967. The Plaintiff has not alleged, or even argued, what discretionary authority was breached. The Court has reviewed the LPA and notes the absence of discretionary language, other than grounds for termination under Section 10 and 2.b., and assigning and subletting under Section 8. There are no allegations that either of these were breached as to Gray Jay. Likewise, the Plaintiff has not alleged any specific acts of dishonesty by Gray Jay or which act Gray Jay specifically performed in a commercially unreasonable manner.

The Court dismisses Claim VII in its entirety. Accepting the Plaintiff's allegations as true, and in the light most favorable to it, the Plaintiff has not made factual allegations sufficient to state a plausible claim for relief for breach of the covenant of good faith and fair dealing against Gray Jay.

CONCLUSION

WHEREFORE, the Court hereby partially GRANTS Gray Jay Ventures LLC, f/k/a GP Granby Holdings, LLC's, Granby Prentice LLC's and GR Terra LLC's Motion to Dismiss and dismisses Claims VI and VII of the Plaintiff's Second Amended Complaint. The Court DENIES the Private Defendant's Motion to Dismiss as to all other claims

SO ORDERED this 28th day of January, 2022.

Mary C. Hoak

Mary C. Hoak, District Court Judge

NOTICE OF APPEAL
(C.A.R. 3(d)(8) APPENDIX)

DATE FILED
May 15, 2025 7:11 PM
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ATTACHMENT #3

DISTRICT COURT, GRAND COUNTY, COLORADO 307 Moffat Avenue/P.O. Box 192 Hot Sulphur Springs, CO 80451 970-725-3357 **Plaintiff:** GRANBY RANCH METROPOLITAN DISTRICT, a quasi-municipal corporation and political subdivision of the State of Colorado, vs. **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.	DATE FILED January 28, 2022 CASE NUMBER: 2021CV30008 **COURT USE ONLY**
	Case No: 2021CV030008

ORDER GRANTING THE MOTION TO DISMISS OF REDWOOD CAPITAL FINANCE CO., LLC, BY GRANBY PRENTICE, LLC, ITS SUCCESOR BY CONTRACT AND INDEMINITOR

This matter comes before the Court on the Motion to Dismiss of Redwood Capital Finance Co., LLC ("Redwood") by the Granby Prentice, LLC ("Granby Prentice"), its Successor by Contract and Indemnitor (the parties collectively shall be "Granby Prentice/Redwood") filed on July 12, 2021. The Plaintiff Granby Ranch Metropolitan District (the "Plaintiff") filed its Response on July 30, 2021, and Granby Prentice/Redwood filed its Reply on August 13, 2021. Upon being fully apprised of the facts and law, the Court finds and rules as follows:

FACTS

The Court issued orders in this matter dated January 28, 2022, which more thoroughly discusses the facts of this case. For purposes of this motion and in addition to the facts stated in the Court's Order issued January 28, 2022, the Court notes Redwood was a limited liability company organized in the State of Delaware.[1] (Mot. Dismiss, Ex. A.) In 2005, Redwood entered into a loan agreement with Granby Realty Holdings ("GRH" and the "GRH Loan"), which granted Redwood a deed of trust on property GRH sought to develop (the "2005 Redwood Deed of Trust"). (Mot. Dismiss, Ex. B.)

In April 2016, Redwood assigned its right, title, and interest in the 2005 Redwood Deed of Trust to Granby Prentice. (Mot. Dismiss, Ex. C.).

In December 2018, the Delaware Secretary of State issued a Certificate of Cancellation for Redwood. (Mot. Dismiss, Ex. D.) There is a California Certificate of Cancellation for Redwood filed on the same date. (Mot. Dismiss, Ex. E.) Redwood was not authorized to do business in Colorado.

GRH defaulted on the GRH Loan. (Sec. Amend. Compl., ¶ 34.) On March 24, 2020, Granby Prentice initiated a non-judicial foreclosure proceeding on the Leased Premises pursuant to its rights under the Deed of Trust. (Sec. Amend. Compl., ¶ 34.) On August 14, 2020, the Grand County Public Trustee (the "Public Trustee") held a public sale of the property. Granby Prentice submitted the successful bid and the Public Trustee issued Granby Prentice a Certificate of Purchase. At some point, Granby Prentice assigned the Certificate of Purchase to Gray Jay Ventures, LLC, f/k/a GP Granby Holdings, LLC ("Gray Jay").

On February 23, 2021, the Plaintiff filed this action, asserting claims against Headwaters Metropolitan District ("Headwaters") and Gray Jay. On May 20, 2021, the Plaintiff amended its Complaint and added Redwood, among others, as a party defendant.

On June 7, 2021, the Plaintiff filed an Affidavit of Service (the "Affidavit") that describes GRMD's attempt to serve the Amended Complaint and Summons on Redwood. The Affidavit states that the Amended Complaint and Summons were served on June 2, 2021 on Redwood's "Registered Agent: National Registered Agents, Inc." in Wilmington, Delaware.

On July 6, 2021, the Plaintiff filed a Second Amended Complaint asserting breach of contract and tortious interference with contract claims against Redwood. The Plaintiff has not served Redwood with the Second Amended Complaint.

[1] According to the Plaintiff's Second Amended Complaint "Defendant Redwood Capital is a Delaware Limited Liability Company with its principal place of business located at 10100 Santa Monica Blvd., Suite 1000, Los Angeles, CA 90067. Defendant's registered agent is National Registered Agents, Inc. whose mailing address is 1209 Orange Street, Wilmington, DE 19801. According to the records of the California Secretary of State, Redwood Capital was authorized to do business in the State of California but was 'cancelled.' There is no evidence that Redwood Capital was ever authorized to do business in Colorado." (Sec. Amend. Compl., ¶ 4).

RULING

I. C.R.C.P. 12(b)(4) and Insufficient Service of Process.

The Court grants Granby Prentice/Redwood's motion to dismiss the Second Amended Complaint on the grounds of ineffective service of process.

Granby Prentice/Redwood seeks dismissal of the Second Amended Complaint because of ineffective service of process on a cancelled LLC (incapable of being served). Granby Prentice/Redwood also argues ineffective service of process as to the Second Amended Complaint.[2]

The Court dismisses this matter pursuant to Colorado Rule of Civil Procedure ("C.R.C.P") 4(m). As to the Second Amended Complaint, C.R.C.P. 4(m) requires that "[i]f a defendant is not served within 63 days (nine weeks) after the complaint is filed, the court--on motion or on its own after notice to the plaintiff--shall dismiss the action without prejudice against that defendant or order that service be made within a specified time. But if the plaintiff shows good cause for the failure, the court shall extend the time for service for an appropriate period." C.R.C.P. 4(m). The Plaintiff has not served Redwood with the Second Amended Complaint. The Plaintiff acknowledged that, as of July 31, 2021, it had not served the Second Amended Complaint on Redwood but would do so by August 9, 2021. There is no record in the file that this took place. For this reason alone, dismissal without prejudice is proper.

The Court also finds that service of the Amended Complaint was not perfected. "A court may not exercise personal jurisdiction over a defendant without valid service of process." Ledroit Law v. Kim, 360 P.3d 247, 250 (Colo. App. 2015); United Bank of Boulder, N.A. v. Buchanan, 836 P.2d 473, 476 (Colo. App. 1992) (mere existence of personal jurisdiction is insufficient, and proper service must be accomplished to perfect court's exercise of jurisdiction.). Absent valid service, any default judgment issued by the court is a nullity. Ledroit Law, 360 P.3d at 254; Goodman Associates, LLC v. WP Mountain Properties, LLC, 222 P.3d 310, 315 (Colo. 2010).

Colorado law permits service on a "registered agent for service as set forth in the most recently filed document in the records of the secretary of state of this state or of any other jurisdiction" and on "any designee authorized to accept service of process for such entity or person, or by delivery to a person authorized by appointment or law to receive service of process for such entity or person." C.R.C.P. 4(e)(4) and (12).

Granby Prentice/Redwood's argument is essentially that service on "National Registered Agents, Inc." in Wilmington, Delaware did not conform to Rule 4(e) because Redwood was a cancelled entity at the time of service.

A Delaware limited liability company cannot be sued after it dissolves and files a certificate of cancellation. Corder v. Antero Resources Corporation, 322 F. Supp. 3d 710, 716 (N.D.W. Va.

[2] Granby Prentice/Redwood does not seek to quash the affidavit of service nor does it challenge this Court's personal jurisdiction over Redwood pursuant to Rule 12(b)(2). These issues are, therefore, not before the Court.

2018); Metro Communications Corp. BVI v. Advanced Mobilecomm Technologies Inc., 854 A.2d 121, 139 (Del. Ch. 2004) ("[A]bsent statutory authority, no claim may be brought against a dissolved entity"). Delaware's Limited Liability Company Act provides that "[a] certificate of formation shall be canceled upon the dissolution and the completion of winding up of a limited liability company" and that "[a] certificate of cancellation shall be filed in the office of the Secretary of State to accomplish the cancellation of a certificate of formation upon the dissolution and the completion of winding up of a limited liability company…" 6 D. Code § 18-203. Up until this point, those winding up an LLC's affairs may prosecute and defend suits on the LLC's behalf until the filing of the certificate of cancellation." Del C. 18-803(b); Matthew v. Laudamiel, 2012 WL 605589, at *21 n.148 (Del. Ch. 2012).[3] Thus, a dissolved limited liability company cannot "be served with process through traditional means available for service upon a viable legal entity" where the entity "no longer has a registered agent or active senior officers upon whom personal service could be perfected." Tratado de Libre Commercio, LLC v. Splitcast Technology, LLC, 2019 WL 1057976, at *1 (Del. Ch. 2019).

The Plaintiff argues that Delaware law permits the Plaintiff to recover from Redwood, despite the LLC's cancellation/dissolution, because Redwood knew of its obligation to the Plaintiff (to act as a Landlord under the LPA) and Redwood should have anticipated that a third-party beneficiary (such as the Plaintiff) could bring a cause of action against it. According to the Plaintiff, Redwood's "cancellation was a legal nullity, and it can still be sued and served with process."

The Court disagrees.

The Plaintiff cites to 6 Del. C. § 18–804: "[a] limited liability company which has dissolved" "[s]hall pay or make reasonable provision to pay all claims and obligations, including all contingent, conditional or unmatured contractual claims, known to the limited liability company." It must

> make such provision as will be reasonably likely to be sufficient to provide compensation for claims that have not been made known to the limited liability company or that have not arisen but that, based on facts known to the limited liability company, are likely to arise or to become known to the limited liability company within 10 years after the date of dissolution.

6 Del. C. § 18-804(b)(3).

This section thus requires a dissolved LLC to provide compensation for all claims – "including all contingent, conditional or unmatured contractual claims" - that are known to the limited liability company. Capone v. LDH Management Holdings LLC, 2018 WL 1956282, at

[3] The Court recognizes the lack of precedential value in unpublished cases. In this instance, however, the Court finds the unpublished cases cited herein carry persuasive authority and the Court cites to them accordingly. See Patterson v. James, 2018 COA 173, ¶ 43 (trail court did not err when it considered unpublished decision). Colorado appellate courts also frequently cite to unpublished cases. See Gagne v. Gagne, 2019 COA 42, ¶ 20; People v. Garrison, 2017 COA 107, ¶ 50.

*7 (Del. Ch. 2018); see also 800 Cooper Finance, LLC v. Shu-Lin Liu, 2019 WL 5078725, at *4 (D.N.J. Oct. 10, 2019) (citing to Capone). Claims "'include, without limitation, contract, tort, or statutory (e.g., tax) claims against . . . the limited liability company, whether or not reduced to judgment.'" Capone, at *8. According to the Plaintiff, Redwood agreed to enter into a subordination agreement and "[a]ssuming that this agreement was in fact executed and delivered, Redwood Capital agreed to be bound by the LPA and all of Headwater's rights under the LPA, including the purchase provisions of Section 23, and to act as Landlord if it acquired title to the Leased Premises."

The Court finds this problematic for two reasons. First, the Plaintiff has not provided any evidence that Redwood knew about the LPA or the purported subordination agreement. There is no evidence, other than the language of the LPA, that the subordination agreement was executed and delivered. Second, the Plaintiff has not provided any evidence that it has petitioned the Court of Chancery to nullify Redwood's certificate of cancellation.

If a court "finds that an LLC's affairs were not wound up in compliance with the Delaware Limited Liability Company Act, it may nullify the certificate of cancellation, which effectively revives the LLC and allows claims to be brought by and against it." Laudamiel, 2012 WL 605589, at *22 n. 148;

> When the certificate of formation of any limited liability company formed under this chapter shall be canceled by the filing of a certificate of cancellation pursuant to § 18-203 of this title, the Court of Chancery, on application of any creditor, member or manager of the limited liability company, or any other person who shows good cause therefor, at any time, may either appoint 1 or more of the managers of the limited liability company to be trustees, or appoint 1 or more persons to be receivers, of and for the limited liability company, to take charge of the limited liability company's property, and to collect the debts and property due and belonging to the limited liability company, with the power to prosecute and defend, in the name of the limited liability company, or otherwise, all such suits as may be necessary or proper for the purposes aforesaid, and to appoint an agent or agents under them, and to do all other acts which might be done by the limited liability company, if in being, that may be necessary for the final settlement of the unfinished business of the limited liability company.

6 Del. C. § 18-805.

The Plaintiff has not demonstrated that it is currently seeking to nullify Redwood's cancellation for final settlement of unfinished business. It has also not argued that Redwood was noncompliant in winding up its affairs.

There is no evidence, therefore, before the Court that sections 804 and 805 apply herein. As such, Section 803 and Delaware common law protect Redwood from being sued post dissolution and post filing of the certificate of cancellation. Corder, 322 F. Supp. 3d at 716.[4]

[4] As an aside, the Court notes that in Delaware, dissolved corporations are continued for three years for the purpose of prosecuting and defending suits. 8 Del. C. § 278. The Delaware Limited Liability Company Act does not contain a similar three-year wind up provision.

Redwood filed its Certificate of Cancellation on December 28, 2018. (Mot. Dismiss, Ex. D.) The Plaintiff filed its Amended Complaint on May 20, 2021, two and a half years after Redwood dissolved and filed its certificate of cancellation. As such, the Plaintiff's attempted service on "National Registered Agents, Inc." in Wilmington, Delaware was ineffective. The Plaintiff has not met its burden of proof to establish proper service where service is facially invalid. Bush v. Winker, 892 P.2d 328, 332 (Colo. App. 1994).

The Court, however, notes that while it may lack jurisdiction over a defendant because of defective service, such failure does not warrant dismissal of the complaint for that reason alone. ReMine ex rel. Liley v. Dist. Court for City and County of Denver, 709 P.2d 1379, 1383 (Colo. 1985) (citing Hoen v. District Court, 412 P.2d 428, 430 (1966) and Fletcher v. District Court, 322 P.2d 96, 97 (Colo. 1958)). The Colorado Supreme Court has expressly stated that

> the proper procedure is not to dismiss a complaint because of improper or invalid service of process; the trial court should, in such a case, merely hold the service invalid and allow the action to stand so that the plaintiff can continue to seek proper service. To do otherwise could, for example, prevent the tolling of a statute of limitations or harm a plaintiff in some other manner.

Bolger v. Dial-A-Style Leasing Corp., 409 P.2d 517, 518 (Colo. 1966).

Regardless, the Court does not allow for more time in which to perfect service because, as outlined below, the Plaintiff fails to state a claim for either breach of contract or tortious interference of contract, therefore, regardless of whether Redwood is properly served, the claims against Redwood fail as a matter of law.

II. C.R.C.P. 12(b)(1) and Subject Matter Jurisdiction.

The Court denies Redwood's Motion to Dismiss on the grounds of lack of standing and lack of subject matter jurisdiction.

Redwood joins in Section 1 of the Private Defendants' Motion to Dismiss (i.e., that the Plaintiff is not a party to or third-party beneficiary of the LPA). For the same reasons discussed in its Order dated January 28, 2022, the Court denies Redwood's Motion to Dismiss for lack of standing and subject matter jurisdiction.

III. C.R.C.P. 12(b)(5) and Failure to State a Claim.

The Court grants Redwood's C.R.C.P. 12(b)(5) motion on the grounds that the Plaintiff has failed to state a claim upon which relief can be granted.

"A C.R.C.P. 12(b)(5) motion to dismiss for failure to state a claim upon which relief can be granted serves as a test of the formal sufficiency of a plaintiff's complaint. The chief function of a complaint is to give a defendant notice of the transaction or occurrence that is the subject of a plaintiff's lawsuit." Public Service Co. of Colorado v. Van Wyk, 27 P.3d 377, 385 (Colo. 2001). A C.R.C.P. 12(b)(5) motion to dismiss is looked upon with disfavor, and a complaint should not

be dismissed unless it appears beyond a doubt that a plaintiff can prove no set of facts in support of her claim which would entitle her to relief. A complaint should not be dismissed for failure to state a claim so long as the plaintiff is entitled to some relief upon any theory of the law. Id. at 385-386 (citations omitted).

"To survive a motion to dismiss under C.R.C.P. 12(b)(5), a plaintiff must plead sufficient facts that ... suggest plausible grounds to support a claim for relief." Patterson v. James, 2018 COA 173, ¶ 23 (citing Warne v. Hall, 2016 CO 50, ¶ 24). "A claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." Barnes v. State Farm Mutual Automobile Insurance Company, 497 P.3d 5, 10 (Colo. App. 2021). This Court views the factual allegations in the complaint as true and in the light most favorable to the plaintiff. Pena v. American Family Mutual Insurance Company, 2018 COA 56, ¶ 15. The Court is not required to accept as true legal conclusions couched as factual allegations and a complaint may be dismissed if the substantive law does not support the claims asserted. Western Innovations, Inc. v. Sonitrol Corp., 187 P.3d 1155, 1158 (Colo. App. 2008); Froid v. Zacheis, 2021 COA 74, ¶ 29 (quoting Scott v. Scott, 2018 COA 25, ¶ 19, 428 P.3d 626) ("plausibility standard emphasizes that facts pleaded as legal conclusions (i.e., conclusory statements) are not entitled to the assumption that they are true").

In its review, a court may consider only the facts alleged in the complaint, documents attached as exhibits or referenced in the complaint, and matters of which the court may take judicial notice, such as public records. Walker v. Van Laningham, 148 P.3d 391, 397 (Colo. App. 2006); Pena v. Am. Family Mut. Ins. Co., 2018 COA 56, ¶ 14. A motion to dismiss, however, may be converted to a motion for summary judgment if a party presents matters outside the pleadings. C.R.C.P. 12(c); SaBell's, Inc. v. Flens, 599 P.2d 950, 952 (Colo. App. 1979).

"A document that is referred to in the complaint, even though not formally incorporated by reference or attached to the complaint, is not considered a 'matter outside the pleading.'" Yadon v. Lowry, 126 P.3d 332, 336 (Colo. App. 2005). If that document "is central to the plaintiff's claim, the defendant may submit an authentic copy to the court to be considered on a motion to dismiss, and the court's consideration of the document does not require conversion of the motion to one for summary judgment." Id. (quoting James Wm. Moore et al., Moore's Federal Practice § 56.30[4], at 56–225 & –226 (3d ed. 2005)). An authentic copy is not required (and conversion unnecessary) where the plaintiff refers to and relies upon that document and does not dispute its authenticity. See Yadon, 126 P.3d at 336.

Conversion is required, however, if matters are submitted in a motion to dismiss that are outside of these described situations. Bristol Bay Productions, LLC v. Lampack, 2013 CO 60, ¶ 46; Churchey v. Adolph Coors Co., 759 P.2d 1336, 1339 (Colo.1988) ("Because [defendant] attached affidavits and exhibits to its motion, the court properly treated [defendant's] motion as one for summary judgment."); Garcia v. Centura Health Corp., 2020 COA 38, ¶ 50 (motion to dismiss properly treated as motion for summary judgment where defendant attached affidavits and exhibits to its motion and the district court considered these attachments in its order).

The Court does not need to convert the present motion into one for summary judgment. Here, Granby Prentice/Redwood submitted six unauthenticated exhibits that were not attached to the pleadings. These exhibits were, however, referenced by the Plaintiff in the Second Amended Complaint. (Mot. to Dismiss, Exs. A-F; Sec. Amend. Compl., ¶ 4, 33-34.) The Plaintiff does not dispute their authenticity. The Plaintiff also does not submit any exhibits or affidavits of its own.

When documents are presented to the court in a motion to dismiss, the legal effect of the document is determined by their contents rather than by the allegations as stated in the complaint. Peña, 463 P.3d at 882; Stauffer v. Stegemann, 165 P.3d 713, 716 (Colo. App. 2006). In considering documents attached or referenced in a complaint, "a trial court is not required to accept legal conclusions or factual claims at variance with the express terms of the document attached to the complaint." Stauffer, 165 P.3d at 716.

A. The Plaintiff's Breach of Contract Claim Against Redwood Fails as A Matter of Law (Claim III).

The Plaintiff's breach of contract claim of Second Amended and Restated Lease Purchase Agreement (the "LPA") against Redwood fails as a matter of law.

According to the Plaintiff, Redwood breached its duties to the Plaintiff, when it "refused to acknowledge the existence of the LPA and thus failed to act as a Landlord to and recognize the rights of Headwaters under the LPA." (Sec. Amend. Compl. ¶ 60). According to the Plaintiff, "Redwood Capital agreed to execute a Subordination, Non-disturbance and Attornment Agreement. Assuming that this agreement was in fact executed and delivered, Redwood Capital agreed to be bound by the LPA and all of Headwater's rights under the LPA, including the purchase provisions of Section 23, and to act as Landlord if it acquired title to the Leased Premises." (Sec. Amend. Compl., ¶ 59).

Granby Prentice/Redwood seeks dismissal of this claim because the Plaintiff fails to allege Redwood was a party to the LPA, or that Redwood ever took title to the Leased Premises. The Court does not address the first argument because it is already found the Plaintiff sufficiently alleged third-party beneficiary status under C.R.C.P. 12(b)(1) in its Order dated January 28, 2022. The Court finds the Plaintiff satisfied the C.R.C.P. 12(b)(5) standards regarding pleading third-party beneficiary status as to the breach of contract claim.

As to the breach of contract claim itself, to prevail on such a claim, a plaintiff must prove: (1) the existence of a contract, (2) that it performed their contractual duties or a justification for nonperformance of contractual duties, (3) that the other party to the contract failed to perform, and (4) damages resulted. Long v. Cordain, 343 P.3d 1061, 1067 (Colo. App. 2014).

The Plaintiff's allegation rests on Section 13.b. and Section 26 of the LPA. Section 13.b. 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).

(Sec. Amend. Compl., Ex. 6, ¶ 13.b.).[5] Section 26 provides:

> 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 and which shall provide, among other things, that upon such lender's succession of interest it shall be bound as Landlord to the provisions of this Lease, including the Tenant's right to acquire the Leased Premises in accordance with Section 23 hereof. Such instrument will be completed by Tenant and delivered to Landlord within 10 days of the date requested.

(Sec. Amend. Compl., Ex. 6 ¶ 26).

The conditions described in Section 26 are not pleaded by the Plaintiff. For instance, the Plaintiff has not alleged that GRH requested Headwaters to subordinate the Lease to the 2005 Redwood Deed of Trust. The Plaintiff has not alleged that Headwaters completed a subordination agreement, with or without the request. The Plaintiff has also not alleged that Redwood provided Headwaters a non-disturbance agreement. The Plaintiff argues only that Sections 13 and 26 of the LPA are evidence that these events took place thereby binding Redwood.

In Section 13.b., the parties acknowledged that GRH delivered an actual subordination agreement, executed by Redwood, to Headwaters obligating Redwood to be bound by the LPA. The Plaintiff has not provided evidence that Redwood executed this agreement or that it was delivered to Headwaters. The Plaintiff has not cited any legal authority that acknowledgment of the agreement is evidence that it was executed.

Even if such an agreement does exist, there is no dispute that it is an unrecorded document. C.R.S. § 38-35-108 provides that

> When a deed or any other instrument in writing affecting title to real property has been recorded and such deed or other instrument contains a recitation of or reference to some other instrument purporting to affect title to said real property, such recitation or reference shall bind only the parties to the instrument and shall not be notice to any other person whatsoever unless the instrument mentioned or

[5] The "Prior Lease" is the "Amended and Restated Lease Purchase Agreement dated as of June 1, 2006, as amended by the First, Second, Third, Fourth and Fifth Addenda." (Sec. Amend. Compl., Ex. 6, Recital A).

> referred to in the recital is of record in the county where the real property is situated.

C.R.S.§ 38-35-108 (underline added). The Plaintiff does not allege that the purported agreement was recorded. The Plaintiff also does not allege that Redwood had actual notice of this agreement. See Page v. Fees-Krey, Inc., 617 P.2d 1188 (Colo. 1980) (constructive notice of a reservation of royalty interest is binding, even though the reservation is not part of a recorded document).

As such, any purported subordination agreement bound only Headwaters and GRH, not Redwood.

Without the allegations of the occurrence of the conditions described in Section 26, without legal authority that reference to certain conditions is evidence that the conditions took place, and without evidence of a recorded document, the Court finds that the Plaintiff has failed to state a claim for breach of the LPA.

To the extent the Plaintiff alleges Redwood succeeded to GRH's interest as Landlord when Redwood foreclosed on the property, the Plaintiff has not cited any legal authority or citations to the record (other than the LPA) to support this argument. The Court further notes the 2005 Redwood Deed of Trust specifically provides that it "shall not cause Beneficiary to be … responsible or liable for the control, care, management or repair of the Subject Property or for performing any of the terms, agreements, undertakings, obligations, representations, warranties, covenants and conditions of the Leases…" (Mot. to Dismiss, Ex. B, ¶ 3.3). Leases is defined as "all leases of the Subject Property or any portion thereof, all licenses and agreements relating to the management, leasing, operation of the Subject Property or any portion thereof, and all other agreements of any kind relating to the use or occupancy of the Subject Property or any portion thereof, whether now existing or entered into after the date hereof, if any; and (b) the rents, issues, deposits and profits of the Subject Property, including, without limitation, all amounts payable and all rights and benefits accruing to Trustor under the Leases." (Id. ¶ 3.1).

B. The Plaintiff's Tortious Interference with Contract Claim Against Redwood Fails as A Matter of Law (Claim VI).

The Plaintiff's sixth claim, tortious interference with contract claim against Redwood, fails as a matter of law.

The Plaintiff argues that Redwood was a successor in interest to the LPA, knew of its termination requirements and knew that the failure of Headwaters to operate the Amenities would trigger termination of the LPA under Section 10.[6]

[6] This argument is based on Gray Jay's November 2020 notification to Headwaters that it was terminating the LPA under § 10 based upon Headwaters' failure to operate the Amenities in accordance with the LPA. (Sec. Amend. Compl. ¶ 40-41).

A claim of tortious interference with contract requires 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, 912 (Colo. App. 1991).

A claim for tortious interference applies only when one, not a party to the contract, induces a third party to breach the contract, or interferes with the third party's performance of the contract. Colorado Nat. Bank of Denver v. Friedman, 846 P.2d 159, 170 (Colo. 1993). "[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.

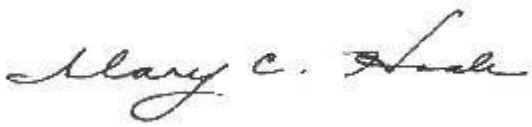
The Court finds the Plaintiff's claim for tortious interference with contract fails because there are no allegations that Redwood took any action to interfere with the LPA under Section 10 or otherwise. The Plaintiff bases its entire claim on the conduct and actions of Gray Jay.

The Court dismiss the Plaintiff's Claim VI as to Redwood.

CONCLUSION

WHEREFORE, the Court hereby GRANTS Granby Prentice LLC's Motion to Dismiss.

SO ORDERED this 28th day of January, 2022.



Mary C. Hoak, District Court Judge

NOTICE OF APPEAL
(C.A.R. 3(d)(8) APPENDIX)

DATE FILED
May 15, 2025 7:11 PM
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CASE NUMBER: 2025CA894

ATTACHMENT #4

DISTRICT COURT, GRAND COUNTY, COLORADO 307 Moffat Avenue/P.O. Box 192 Hot Sulphur Springs, CO 80451 970-725-3357 _____ **Plaintiff:** GRANBY RANCH METROPOLITAN DISTRICT, a quasi-municipal corporation and political subdivision of the State of Colorado, vs. **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.	DATE FILED July 30, 2023 CASE NUMBER: 2021CV30008 **COURT USE ONLY**
	Case No: 2021CV30008
ORDER DENYING THE PLAINTIFF/COUNTERCLAIM DEFENDANT GRMD'S RENEWED MOTION FOR SUMMARY JUDGMENT ON COUNTS I, II, AND III OF DEFENDANT/COUNTERCLAIM PLAINTIFF GR TERRA'S COUNTERCLAIMS	

TO GRMD'S THIRD AMENDED COMPLAINT; ORDER GRANTING THE DEFENDANT/COUNTERCLAIM PLAINTIFF GR TERRA'S CROSS MOTION FOR SUMMARY JUDGMENT ON COUNTS I, II, AND III OF DEFENDANT/COUNTERCLAIM PLAINTIFF GR TERRA'S COUNTERCLAIMS TO GRMD'S THIRD AMENDED COMPLAINT

This matter comes before the Court on the Plaintiff/Counterclaim Defendant Granby Ranch Metropolitan District's ("Plaintiff" or "GRMD") Renewed Motion for Summary Judgment on Counts I, II, and III of Defendant GR Terra's Counterclaims, filed on January 23, 2023. On February 8, 2023, the Defendant/Counterclaim Plaintiff GR Terra LLC ("GR Terra") filed a Cross-Motion and Opposition to Plaintiff's Renewed Motion for Summary Judgment on Counts 1, II, and III of Defendant GR Terra's Counterclaims to Third Amended Complaint. On January 25, 2023, GR Terra[1] filed a Statement of Uncontroverted Facts. GR Terra also supplemented the Statement of Uncontroverted Facts with additional facts contained within its Cross-Motion. On February 26, 2023, GRMD filed a Response to Statement of Uncontroverted Facts and its own Statement of Additional Material Facts. On March 8, 2023, GRMD filed its Reply in Support of Renwed Motion for Summary Judgment on Counts 1, II, and III of Defendant GR Terra' Counterclaims and Opposition to Cross-Motion. On March 20, 2023, Headwaters Metropolitan District ("Headwaters") and GR Terra filed a Response to Plaintiff's Statement of Material Facts and Defendants' Statement of Additional Material Facts. On March 22, 2023, GR Terra filed a Reply in Support of its Cross-Motion for Summary Judgment on Counts 1, II, and III of Defendant's GR Terra's Counterclaims, in which GR Terra included a response to GRMD's Supplemental Statement of Facts.

Upon being fully apprised of the facts and law, the Court finds and rules as follows:

PROCEDURAL BACKGROUND

The Court addressed the facts of this case in its three Orders dated January 28, 2022.[2] The defined terms contained therein have the same meaning here. Since that time and on February 11, 2022, GR Terra filed an Answer, Affirmative Defenses, Jury Demand and Counterclaims to GRMD's Second Amended Complaint. On March 4, 2022, GRMD filed a Reply to GR Terra's Counterclaims.

On March 15, 2022, GRMD filed a Motion for Summary Judgment on to GR Terra's Counterclaims I, II, and III. On April 2, 2022, the Court granted GR Terra's Motion to Continue or Stay Response to Motion for Partial Summary Judgment Pending Discovery Pursuant to C.R.C.P. 56(f).

[1] The Defendant Headwaters Metropolitan District and GR Terra filed the Statement of Uncontroverted Facts jointly, GR Terra did not do so solely.

[2] These Orders effectively dismissed (1) GRMD's breach of contract claim against Headwaters for breach of the 2008 Granby IGA (but the Court did not dismiss the breach of contract claims against Headwaters for breach of the 2003 Master IGA and the 2016 IGA) (Claim II); (2) GRMD's claim of breach of covenant of good faith and fair dealing against Headwaters and Gray Jay (Claim VII); (3) GRMD's tortious interference with contract claim against Gray Jay and Granby Prentice (Claim VI); and (4) GRMD's breach of contract claim (Claim III) and tortious interference with contract claim against Redwood Capital (Claim VI).

On October 13, 2022, GRMD filed a Third Amended Complaint.[3] On November 3, 2022, Gray Jay Ventures, LLC ("Gray Jay") and Granby Prentice, LLC ("Granby Prentice") filed their Answer to GRMD's Third Amended Complaint, but Gray Jay and Granby Prentice did not file any counterclaims against GRMD. On the same day, GR Terra and Headwaters each filed a separate Answer, Affirmative Defenses, Jury Demand and Counterclaims to the Third Amended Complaint. On November 25, 2022, GRMD filed its separate replies to GR Terra's and Headwaters' Counterclaims.

GR Terra's Counterclaims against GRMD are as follows: (I) Declaratory Judgment "[d]eclaring that the LPA was terminated in its entirety through foreclosure of the Leased Premises, or alternatively, through Gray Jay's notice of termination, or alternatively, due to Headwaters' failure to appropriate funds for rental payments for the 2021 calendar year or the ensuring (sic) calendar years"; (II) Declaratory Judgment "[d]eclaring that the LPA and any restrictive covenants therein are terminated, removed and canceled from the property"; (III) Quieting Title "in GR Terra to the Leased Premises, free and clear of the LPA and any restrictive covenants, including any covenants in favor of GRMD, and declaring that GRMD has no rights to or interests in the Leased Premises . . ."; (IV) Breach of GRMD's 2016 Service Plan or Improper modification thereof; and (V) Breach of the 2018 Waiver and Release Agreement.

On January 23, 2023, GRMD renewed, and, presumably amended, its March 15, 2022, Motion for Summary Judgment because the present motion was filed with the Court.[4] The Court, therefore, deems GRMD abandoned its March 15, 2022, Motion for Summary Judgment.

STANDARD OF REVIEW

The Court shall enter summary judgment "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Colorado Rule of Civil Procedure ("C.R.C.P.") 56(c); see Condo v. Conners, 266 P.3d 1110, 1114 (Colo. 2011). The moving party "has the burden of establishing the nonexistence of any genuine issue of material fact." Graven v. Vail Associates, Inc., 909 P.2d 514, 516 (Colo. 1995). Such showing must be by convincing evidence. A-1 Auto Repair &

[3] The Third Amended Complaint added allegations "to the Breach of Contract claims against Gray Jay, Headwaters, Granby Prentice, and GR Terra to include specific allegations that each of these entities had actual and constructive knowledge that the LPA existed and that it was bound by its provisions as a covenant running with the land" and "to include a separate claim for declaratory and injunctive relief to enforce the covenant." The Third Amended Compliant also removed Redwood Capital Finance Company, LLC as a party and removed the breach of contract claims against it; removed the tortious interference with contract claim against Gray Jay, Granby Prentice, and Redwood Capital; and removed the breach of the covenant of good faith and fair dealing against Headwaters and Gray Jay.

[4] The following motions and claims/counterclaims have been deemed moot by this Court's Order dated July 30, 2023 in which the Court found GRMD lacks standing to pursue its claims: GR Terra's motion for summary judgment as to GRMD's claims IV (Breach of Contract), V (Declaratory Judgment), and VI (Declaratory Judgment); Headwaters' Motion for Summary Judgment on GRMD's Claim II (Breach of Contract against Headwaters) and VI (Declaratory Judgment); and Gray Jay's and Granby Prentice's Motion for Summary Judgment as to GRMD's Claim III (Breach of Contract) and VI (Declaratory Judgment).

Detail, Inc. V. Bilunas-Hardy, 93 P.3d 598, 603 (Colo. App. 2004). "In determining the propriety of summary judgment, the nonmoving party is entitled to all favorable inferences that may reasonably be drawn from the undisputed facts, and all doubts as to whether a triable issue of fact exists must be resolved against the moving party." Graven v. Vail Associates, Inc., 909 P.2d 514, 516 (Colo. 1995).

"Once a movant makes a convincing showing that genuine issues are lacking, C.R.C.P. 56(e) requires that the opposing party adequately demonstrate by relevant and specific facts that a real controversy exists." Ginter v. Palmer and Co., 585 P.2d 583, 585 (Colo. 1978). In responding to a motion for summary judgment, by affidavit or otherwise, the non-moving party "must set forth specific facts showing that there is a genuine issue for trial." C.R.C.P. 56(e); McDaniels v. Laub, 186 P.3d 86, 87 (Colo. App. 2008); Brown v. Teitelbaum, 830 P.2d 1081, 1084-1085 (Colo. App. 1991). Any doubts as to the existence of a triable issue of fact are to be resolved against the moving party and all inferences must be made in favor of the non-moving party. A.C. Excavating v. Yacht Club II Homeowners Ass'n, Inc., 114 P.3d 862, 865 (Colo. 2005). "Even if it is extremely doubtful that a genuine issue of fact exists, summary judgment is not appropriate." Woodward v. Board Of Directors of Tamarron Ass'n of Condominium Owners, Inc., 155 P.3d 621, 624 (Colo. App. 2007).[5]

RULING

The Court denies the Plaintiff/Counterclaim Defendant GRMD's Renewed Motion for Summary Judgment on Counts I, II, and III of Defendant GR Terra's Counterclaims to GRMD's Third Amended Complaint and grants the Defendant/Counterclaim Plaintiff GR Terra's Cross Motion For Summary Judgment on Counts I, II, and III of Defendant GR Terra's Counterclaims to GRMD's Third Amended Complaint

GRMD contends GR Terra's Counterclaims I (claim for Declaratory Judgment that the 2012 LPA was terminated in its entirety through foreclosure of the Leased Premises or, alternatively, through Gray Jay's notice of termination or, alternatively, due to Headwaters'

[5] Neither party objects to the others' exhibits so the Court deems any such argument waived and considers all of the exhibits on both sides. "A court must disregard documents referred to in a motion for summary judgment that are not sworn or certified." Cody Park Prop. Owners' Ass'n, Inc. v. Harder, 251 P.3d 1, 4 (Colo. App. 2009); D.R. Horton, Inc.-Denver v. D & S Landscaping, LLC, 215 P.3d 1163, 1166 (Colo. App. 2008) ("'Unsworn expert witness reports are not admissible to support or oppose a motion for summary judgment.'"). "Sworn or certified copies of all papers or parts thereof referred to in an affidavit shall be attached thereto or served therewith." C.R.C.P. 56(e). "A party [asserting or] opposing a motion for summary judgment must 'set forth such facts as would be admissible in evidence.'" Glover v. Innis, 252 P.3d 1204, 1208 (Colo. App. 2011). "Failure to authenticate a document or otherwise submit evidence establishing its admissibility precludes consideration of the document for purposes of summary judgment." St. Croix v. University of Colorado Health Sciences Center, 166 P.3d 230, 244 (Colo. App. 2007). A party, however, can waive objection to the lack of certification or affidavit by their reliance on such exhibits. Johnson v. Mountain Sav. & Loan Ass'n, 426 P2.d 962, 963 (Colo. 1967). "When neither party disputes the competence or admissibility of evidence offered in support of and in opposition to the summary motion, we may consider all this record evidence in our analysis." Woodward, 155 P.3d at 624; People v. Gargano, 306 P.3d 109, 111, fn.2, fn.3 (Colo. O.P.D.J. 2012) (stating that where parties do not object to the sufficiency of exhibits in summary judgment motions and responses, objections are deemed waived and the court can take such exhibits into account when making a ruling)).

failure to appropriate funds for rental payments for the 2021 calendar year or the ensuing calendar years), II (claim for decaratory judgment that, to the extent the 2012 LPA created restrictive covenants, those terminated covenants are terminated, removed and canceled from the property), and III (a claim for quiet title pursuan to C.R.C.P. § 105(a) quieting title of the Leased Premises in GR Terra free and clear of any right, title or interest under the 2012 LPA), fail as a matter of law because the 2012 LPA has not been terminated by its own terms and the 2020 Foreclosure did not extinguish the 2012 LPA. Specifically, GRMD maintains that (1) Headwaters did not fail to appropriate rent pursuant to sections 2 and 3 of the LPA; (2) Headwaters did not fail to operate for more than 30 days; and (3) Redwood Capital Finance Co. ("Redwood") 2020 Foreclosure did not extinguish the LPA.[6]

GR Terra's Cross-Motion for Summary Judgment argues the same underlying facts demonstrate that the 2012 LPA was terminated and/or extinguished for these same reasons – i.e. Headwaters did not appropriate rent, Headwaters failed to operate for more than 30 days, and the 2020 Foreclosure extinguished the LPA. GR Terra moves for judgment as a matter of law on these same three counterclaims.[7]

The Court separates the parties' arguments into two sections: one section addressing the 2020 Foreclosure and the others section addressing the terms of the 2012 LPA.

A. The 2020 Foreclosure Extinguished the 2012 LPA

The 2020 foreclosure extinguished the 2012 LPA.

1. GRMD's Motion

[6] In 2005, Redwood Capital Finance Co. entered into a Loan Agreement with Granby Ranch Holdings (the "GRH Loan"), which granted Redwood various deeds of trust on property owned by Granby Ranch Holdings (the "2005 Deed of Trust"). (Defendants Headwaters and GR Terra's Uncontroverted Statement of Facts, ¶ 12). Granby Prentice became the holder of the 2005 Deed of Trust by the spring of 2020. (Id. at ¶ 52). Granby Ranch Holdings defaulted on the GRH Loan. (Id. at ¶ 51). In the spring of 2020, Granby Prentice initiated non-judicial foreclosure proceeding on the Leased Premises. (Id. at ¶ 52). On August 14, 2020, the Grand County Public Trustee held a public sale of the property and Granby Prentice was the successful bid. (Id. at ¶ 53). The Public Trustee issued it a Certificate of Purchase and Granby Prentice then assigned that certificate to Gray Jay. (Id. at ¶ 53). On May 5, 2021, GR Terra and its affiliate, GRCO, LLC, purchased the property from Gray Jay. (Id. at ¶ 68).

[7] The Court need not address GRMD's Claim V in GRMD's Third Amended Complaint. GRMD's Claim V in GRMD's Third Amended Complaint was pled as Claim VIII in GRMD's Second Amended Complaint. In the Court's January 28, 2022, Order, the Court granted Gray Jay, Granby Prentice, and GR Terra's motion to dismiss the claim that the LPA survives because it is an installment land contract. According to GRMD, Claim V "is pled solely to preserve any rights to appeal that Plaintiff may have and is governed by the doctrine of law of the case." (Third Am. Complaint, ¶ 79).

a. GRMD has not Demonstrated the 2012 LPA was a Covenant Running with the Land or, if it was, that it would Survive Foreclosure as a Matter of Law.

GRMD has not not demonstrated the 2012 LPA was a convenant running with the land or, if it was, that it would survive foreclosure as a matter of law.

GRMD contends that the 2012 LPA survives any non-judicial foreclosure because this Court has already determined that the 2012 LPA is a covenant running with the land. (Mot., p. 13). GRMD also cites to Section 28.f of the 2012 LPA which provides

> f. 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…

(Headwaters and GR Terra's Statement of Uncontroverted Facts, Ex. 13, ¶ 28f.).

GRMD has not specified how or why the 2012 LPA touches and concerns the land.[8] See Cloud v. Association of Owners, Satellite Apartment Bldg., Inc., 857 P.2d 435, 440 (Colo. App. 1992) (a covenant "must closely relate to the land, its use, or its enjoyment."). GRMD does not address the fundamental elements necessary to establish a covenant running with the land. The parties must intend to create a covenant running with the land and the covenant must touch and concern the land with which it runs. Reishus v. Bullmasters, LLC, 409 P.3d 435, 440 (Colo. App. 2016). Additionally, there must be privity of estate between the original parties at the time of the covenant's creation. Taylor v. Melton, 274 P.2d 977, 982 (Colo. 1954) (requiring privity of estate between the covenanting parties). A covenant cannot run with the land, as a matter of law, if there is a failure to satisfy these elements. See Cloud, 857 P.2d at 440 ("Even if there is an intent to make a covenant run with the land, the covenant must still 'touch and concern' the land, that is, it must closely relate to the land, its use, or its enjoyment."). In other words, an agreement alone cannot create a covenant running with the land; the covenant must touch and concern the land. In re Extraction Oil & Gas, Inc., 627 B.R. 199, 221 (Bankr. D. Del. 2020). GRMD makes no attempt at arguing or demonstrating these essential factors.

GRMD instead repeatedly states the Court, in its January 2022 Orders, determined the 2012 LPA was a covenant running with the land, as a matter of law. To be clear, the Court did not determine, as a matter of law, that all covenants running with the land survive foreclosure or that the 2012 LPA was a covenant running with the land. Rather, in its January 2022 Orders, the Court held covenants running with the land are "not necessarily extinguished by a foreclosure" and therefore GRMD had properly stated a claim for relief. (1/28/2022, Order

[8] This Court has already found the 2012 LPA was not an installment land contract, and, even if it could be interpreted as such, it was extinguished by the 2020 Foreclosure. (January 28, 2022, Order Granting in Part Gray Jay Ventures, LLC, Granby Prentice, LLC, and GR Terra LLC's Motion to Dismiss Second Amended Complaint, at pp. 19-21).

Granting in Part Gray Jay Ventures, LLC, Granby Prentice, LLC, and GR Terra LLC's Motion to Dismiss Second Amended Complaint, at p. 18).

Furthermore, the Court agrees with GR Terra that the procedural posture and standards for motions to dismiss for failure to state a claim and motions for summary judgment are materially different. "Although a determination of a Motion to Dismiss affects what claims are considered at the summary judgment stage, specific findings that a claim is plausible has no effect on the determination of a Motion for Summary Judgment." Gibson v. Brown, 2020 WL 1815911, at *3 (D. Colo., Apr. 9, 2020). Although the issues and facts are largely the same, the standards of review are substantitally different. The Court based its January 28, 2022, Order Granting in Part Gray Jay Ventures, LLC, Granby Prentice, LLC, and GR Terra LLC's Motion to Dismiss Second Amended Complaint, in part, on GR Terra's lack of legal authority. ("The Private Defendants … have not cited any cases involving foreclosure under Section 501 and the extinguishment of covenant that runs with the land"). (Order, p. 18.) The Court was not in a procedural position to dismiss the case for failure to state a claim, because it was plausible that GRMD could support its argument that the LPA survived the 2020 Foreclosure because GR Terra had not met its burden and there were potentially sound legal arguments to support GRMD's claim.

Here, however, the standard is whether there is a genuine issue as to any material fact and whether the moving party is entitled to a judgment as a matter of law. C.R.C.P. 56(c). "[A] Motion for Summary Judgment focuses on whether there is enough evidence to proceed to trial." Gibson, 2020 WL 1815911, at *2. To obtain summary judgment, the burden is on GRMD, the moving party, to demonstrate both that the 2012 LPA is a covenant running with the land and that a covenant that runs with land survives foreclosure under C.R.S. § 38-38-501, as a matter of law.

The Court finds GRMD has not demonstrated the 2012 LPA survives foreclosure. First, GRMD cites Top Rail Ranch Estates, LLC v. Walker, 2014 COA 9 and Schwab v. Martin, 441 P.2d 17 (Colo. 1968), two cases that this Court relied upon in its January 2022, Order Granting in Part Gray Jay Ventures, LLC, Granby Prentice, LLC, and GR Terra LLC's Motion to Dismiss Second Amended Complaint. Under Top Rail, 2014 COA 9, ¶ 21, certain covenants running with the land may survive foreclosure. Top Rail had purchased a subdivision of platted lots from Walker Development, executed a promissory note to Walker Development, and secured the note with a deed of trust. Id. at ¶ 5. A provision of the deed of trust allowed Walker Development to pay off any liens encumbering the property, and that if it did so, the paid off lien amounts would become part of Top Rail's debt to which Walker Development would become entitled. Id. at ¶ 20. Later, Top Rail obtained a bank loan for improvements in the subdivision, also secured by a deed of trust. Id. at ¶ 6. Walker Development subordinated its deed of trust to the bank's lien on most of the subdivision lots. Id. After Top Rail's default, the bank foreclosed on its deed of trust and Walker Development redeemed and took title. Id. at ¶ 8. The foreclosed property was subject to a superior lien of a water district for unpaid water tap fees. Id. at ¶ 9. After the foreclosure, Walker Development paid off that lien. Id. The Colorado Court of Appeals held that because Top Rail had assigned to Walker Development the right to cure the water tap lien and covenanted to pay Walker Development the cost of such cure, the contractual rights were not extinguished even though the security interest had been extinguished. Id. at ¶ 22 (the

"contractual rights did not depend on the continued vitality of Walker Development's security interest in the property"). Id.; See also Schwab, 441 P.2d 17 at 19 (despite foreclosure, the right to appoint a receiver under a deed of trust remains operative as a contract between the parties).

GR Terra, however, has persuaded the Court that these holdings are limited to instances in which the surviving contractual obligations were detailed within the foreclosed deed of trust, agreed upon by the borrowers (the same borrowers foreclosed upon) for the lender's benefit, and were then sought to be enforced against the borrowers. While there is disputed evidence that the 2005 LPA was incorporated in the 2005 Loan Agreement,[9] there is no evidence that either the 2005 LPA or the 2012 LPA were for the benefit of Redwood and its successors. These cases also do not involve junior property interests, which is at issue here. As the Court discusses later in this order, the 2005 LPA was superseded and GRMD has not cited any facts or evidence that GRMD somehow maintains its seniority position despite being integrated into the 2006 LPA, which was then integrated into the 2012 LPA. GRMD does not address these critical distinctions and instead states that "[a]s in Schwab and Top Rail, the obligations and covenants contained in the Deeds of Trust, Loan Documents, and Agreements, including the LPA and Amenity Fee Agreement, remain operative contracts separate from the debt and were not extinguished by the foreclosure." (Reply, p. 10). It was incumbent upon GRMD to cite to the specific sections within each document reflecting a contractual obligation intended to survive foreclosure.

The only other case cited by GRMD, as to the foreclosure issue, is Schmelzle v. Key, Inc., 452 P.2d 41 (Colo. 1969). In Schmelze, the Colorado Supreme Court held the plaintiffs had an equitable interest in specific lots, subject to a prior deed of trust, because the plaintiffs had an expectation in the reconveyance of the lots, if the lots were not sold to third-parties. Here, GRMD had no similar expectation, and, therefore, GRMD lacks an equitable interest that could possibly survive foreclosure. The Court finds Schmelze distinguishable and not sufficient to establish that the 2012 LPA survives foreclosure.

Second, GRMD has not demonstrated, as a matter of law, that junior interests/covenants survive statutory foreclosure. The Court addresses the junior encumbrance issue more thoroughly under subsection 2 below regarding GR Terra's Cross Motion. For purposes of this subsection, however, GRMD has not cited any legal authority that a junior interest/covenant survives foreclosure in any instance.

On the other hand, GR Terra cites to numerous cases in which a foreclosure extinguished various types of covenants junior to the foreclosed deed of trust.[10] In Town of Grand Lake v.

[9] The 2005 LPA was not identified as a "Loan Document" in the 2005 Loan Agreement [conditions for financing which were incorporated into the Loan Agreement.] (Statement of Uncontroverted Facts, Ex. 60 Articles 1.1, 1.41, and Ex. A). The 2005 LPA was described, however, within one of the Loan Documents: the "Subordination Agreement executed by Headwaters Metropolitan District in favor of Lender relating to the Lease Purchase Agreement between Borrower [GRH] and Headwaters Metropolitan District." (Id., Article 3.1(a)(xv), Ex. A). It is also disputable whether the "Assignment of District Agreements (and the Consent to Assignment of the District Agreements executed by Headwaters Metropolitan District and the SolVista Metropolitan District" included the 2005 LPA. (Id.).

[10] See Gray v. Shepard, 505 S.W.3d 317, 319-320 (Mo. App. 2016) (foreclosure of a senior deed of trust extinguishes junior covenants and equitable servitudes burdening the real property because purchaser at foreclosure

Lanzi, 937 P.2d 785 (Colo. App. 1996), for instance, a parking agreement, executed after two deeds of trust, was deemed extinguished upon foreclosure of those deeds of trust because of the parking agreement's junior position. In Town of Grand Lake, owners of a village center entered into a parking agreement with the Town in which the owners would provide parking for the Village Center on a nearby lot. Id. at 788. The parking agreement was recorded and stated that it was a covenant appurtenant to both the Village Center and the nearby lot. Id. at 786. At the time of the recording of the parking agreement, Village Center and the nearby lot were both subject to separate deeds of trust. Id. Upon the owners' default, the lenders foreclosed. Id. The Colorado Court of Appeals held the junior encumbrance created by the parking agreement was extinguished by foreclosure, was no longer appurtenant to the Village Center, and was not binding on the subsequent owners of the Village Center. Id. at 788 (citing C.R.S. §§ 38-39-110, 38-38-501, and First Interstate Bank v. Tanktech, Inc., 864 P.2d 116, 119 (Colo. App. 1993)).

b. GRMD Has not Demonstrated the 2012 LPA Survives Foreclosure Because it Serves a Public Purpose.

The Court denies GRMD's Renewed Motion for Summary Judgment on Counts I, II, and III of Defendant GR Terra's Counterclaims because GRMD has not demonstrated the 2012 LPA survives foreclosure because it serves a public purpose.

GRMD contends the 2012 LPA cannot be extinguished by foreclosure because the 2012 LPA serves a public purpose. GRMD encourages the Court to view the 2012 LPA not as a "junior lien but instead more like a 'common element' in a common interest community." (GRMD reply, p. 2). "Just as a public right-of-way in a site plan or a common element of a condominium declaration is not terminated by foreclosure, public rights in the Leased Premises under the LPA cannot be terminated by foreclosure. The LPA reflects the dedication of the premises to public use, and the clear intent is that it will survive foreclosure." (Id., p. 7). GRMD's argument is confusing, especially because it was not raised in its original motion and only within GRMD's reply. The Court interprets GRMD's argument as follows: the 2012 LPA is subject to TABOR;[11] TABOR prohibits the co-mingling of public and private funds;[12] and the

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sale acquires title as it existed on the date the foreclosed deed of trust was recorded); Prestwood v. Weissinger, 945 So.2d 458, 461-62 (Ala. Civ. App. 2005) (foreclosure of senior mortgage extinguished later-created restrictive covenant); Legacy Hills Residential Ass'n, Inc. v. Colonial Bank, 564 S.E.2d 550, 552 (Ga. App. 2002) (title acquired by bank via foreclosure of recorded deed of trust had priority over subsequently recorded protective covenants); Sun Valley Hot Springs Ranch, Inc. v. Kelsey, 962 P.2d 1041, 1045 (Idaho 1998) (foreclosing lender not subject to restrictive covenants because mortgage was recorded before the covenants); Mortgage Investors of Washington v. Moore, 493 So.2d 6, 8-9 (Fla. Dist. Ct. App. 1986) (foreclosure rendered property free of restrictive covenants not in existence when the mortgage was recorded); Sain v. Silvestre, 144 Cal. Rptr. 478, 485 (Cal. App. 1978) (foreclosure of lender's senior deed of trust extinguished later-recorded restrictive covenants); Vernon v. Allphin, 98 So.2d 280, 283-84 (La. App. 1957) (purchaser at foreclosure sale is not subject to restrictions not in existence on the date the mortgage was executed); Talles v. Rifman, 53 A.2d 396, 398 (Md. 1947) (foreclosure of mortgage put to an end any binding effect of later-filed restrictions on the property); Magnolia Petroleum Co. v. Drauver, 83 P.2d 840, 843-44 (Okla. 1938) (foreclosure of prior mortgage destroys later-filed restrictions).

[11] "TABOR" is also known as Article X Section 20 of the Colorado Constitution and it "imposes limits on government spending, revenue gathering and accumulation, and indebtedness." Landmark Towers Association, Inc. by EWG-GV, LLC v. UMB Bank, N.A., 2018 COA 100, ¶ 62.

extinguishment of the 2012 LPA would result in a TABOR violation because the 2012 LPA furthered the collection "of fees from residents (public funds) to subsidize purely private property without public benefit…" (GRMD Response in Opposition to Defendant GR Terra's Motion for Summary Judgment on Counts IV, V and VI, p. 8, incorporated into GRMD Reply at 7-8).

The Court is not convinced.

First, Headwaters is a special district pursuant to C.R.S. § 32-1-101 et seq. A special district, by law, "is a quasi-municipal corporation and political subdivision, solely responsible for its own debts." Landmark Towers Association, Inc. by EWG-GV, LLC v. UMB Bank, N.A., 2018 COA 100, ¶ 66. Colo. Const. Art. XI §§ 1 and 2 specificially do not apply to special districts. Id. (citing N. Colo. Water Conservancy Dist. v. Witwer, 108 Colo. 307, 310, 116 P.2d 200, 201 (1941) ("water conservancy district was a quasi-municipal corporation not subject to sections 1 and 2"); and Milheim v. Moffat Tunnel Improvement Dist., 72 Colo. 268, 280, 211 P. 649, 654 (1922) ("tunnel improvement district wasn't subject to article XI, section 8, which applied, before its 1969 repeal, only to cities and towns")). As a special district, Headwaters is authorized by statute "[t]o acquire, dispose of, and encumber real and personal property including, without limitation, rights and interests in property, leases, and easements necessary to the functions or the operation of the special district…" C.R.S. § 32-1-1001(1)(f). Headwaters is also authorized to provide various services, including those related to parks and recreation. C.R.S. § 32-1-1004(2)(c). As such, Headwaters is authorized to acquire leasehold interests related to recreational services.

Second, GRMD does not cite any legal authority that property interests, let alone junior property interests, utilized in furtherance of a project designed for a public purpose, can survive foreclosure.[13] The opposite appears to be true. Special district property interests may be extinguished by foreclosure upon expiration of the redemption period. Mount Carbon Metropolitan Dist. v. Lake George Co., 847 P.2d 254, 257 (Colo. App. 1993); see also Town of Grand Lake, 937 P.2d at 785. Municipalities are not entitled to "superpriority liens" absent statutory authority. Gold Vain Ltd. Liability Co. v. City of Cripple Creek, 973 P.2d 1286, 1289 (Colo. App. 1999).

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[12] GRMD cites to Colo. Const. Art. XI, §§ 1, 2 and In re Interrogatories by Colo. State Senate (Senate Resolution No. 13) Concerning House Bill No. 1247, 566 P.2d 350, 356 (Colo. 1977).

[13] Similarly, GRMD does not cite to any case in which a public purpose-type development is subject to foreclosure or a special district's property interest survives foreclosure, or to any case involving the intersection of TABOR and statutory foreclosure at all. In fact, GRMD does not define public purpose or cite to any cases involving a public purpose. See Ginsberg v. City and County of Denver, 436 P.2d 685, 688 (Colo. 1968) (citing City and County of Denver v. Hallett, 34 Colo. 393, 83 P. 1066 (Colo. 1905)) ("The test is whether the power, if exercised, will promote the general objects and purposes of the municipality, and of this the legislature is the judge in the first instance…"). The Court is not in a position to do the legal research on these issues for GRMD or to piece together support for an argument offered in a motion. See Gravina Siding and Windows Company v. Gravina, 516 P.3d 37, 50 (Colo. App. 2022) (citation omitted) (it is not the court's "proper function to make or develop a party's argument when that party has not endeavored to do so itself"); see also Redden v. Clear Creek Skiing Corp., 2020 COA 176, ¶ 21, 490 P.3d 1063, 1070 (quoting CSX Transp., Inc. v. Miller, 159 Md.App. 123, 858 A.2d 1025, 1083 (2004) for the proposition that "If [the party] wanted a weightier resolution of the issue, it should have mounted a weightier contention. Gravitas begets gravitas").

> If the General Assembly had wanted to grant municipalities broad authority to collect all nuisance abatement charges with a priority lien . . ., it could have done so . . . Absent statutory authority, a 'superpriority lien' will not be inferred. Rather, if such a 'superpriority lien' is to be imposed, it must be done expressly by the General assembly.

Id. (affirming extinguishment of nuisance abatement lien upon foreclosure of senior deed of trust). GRMD has not identified a statute that grants the 2012 LPA any "superpriority lien" status or gives the 2012 LPA priority (due to its "public purpose") over a security interest recorded over a decade earlier.

For the same reason, the Court is not persuaded by GRMD's argument that GR Terra is subject to the 2012 LPA because GR Terra "had notice of the historical and public nature of the Granby Ranch property and GRMD's interest." (GRMD, Reply in Support of Renewed Motion for Summary Judgment on Counts I, II, and III, p. 11). GRMD cites to Ragsdale Bros. Roofing, Inc. v. United Bank of Denver, N.A., 744 P.2d 750, 753 (Colo. App. 1987), which states a "purchaser is bound by the record. If it indicates the existence of some outside interest by which the title may be affected, a purchaser is bound to investigate and is charged with knowledge of the facts to which the investigation would have led." Ragsdale Bros., however, involved the intersection of C.R.S. §§ 38-22-103(2) (mechanic's lien statute) and C.R.S. § 38–39–110 (predecessor to C.R.S. § 38-38-501). Id. at 752. A search of the chain of title "would have disclosed the existence of the superior mechanic's lien" prior to the sale because a mechanics lien is granted priority over previously recorded interests under certain circumstances per C.R.S.§ 38–22–103(2) and "when a lien is filed later in time than a deed of trust, yet is superior to the deed of trust, the title acquired pursuant to the public trustee's sale and deed is subject to the superior lien." Id. at 753. As such, two mechanics' liens that were filed after the deed of trust was recorded, but before the public trustee sale, were deemed to have survived foreclosure. Here, GRMD has not identified a statute that gives the 2012 LPA priority over a security interest recorded a decade earlier.

Third, the Court rejects GRMD's argument that the 2012 LPA cannot be extinguished because it would violate Colorado law to collect fees from residents to subsidize private property without a public benefit. According to GRMD, the entire scheme of the 2012 LPA was to further Headwaters' or GRMD's eventual acquisition of the Amenities, and any extinguishment of the 2012 LPA removes the public purpose upon which the collection of fees was based.

GRMD has not cited any authority that the public purpose served by the 2012 LPA depended upon Headwaters' or GRMD's ultimate acquisition of the Amenities or that Headwaters was even required to purchase the Amenities. Instead, GRMD cites to a myriad of documents and agreements it contends demonstrate the public purpose of the project. (GRMD's Response in Opposition to Defendant GR Terra's Motion for Summary Judgment on Counts IV, V and VI of the Third Amended Complaint (incorporated into its reply herein, pp. 7-8)). GRMD does not explain the interrelationship between these documents or their legal significance. This Court examined these documents in its Order issued July 30, 2023, and concluded GRMD lacks standing to enforce their terms. As such, even if GRMD had provided

legal authority demonstrating property interests with a public purpose cannot be extinguished by foreclosure, GRMD does not have the right to enforce that public purpose interest here.

Moreover, it would have been contrary to Colorado law for the 2012 LPA to require Headwaters to pay rent or to exercise the option to purchase for future fiscal years. See Glennon Heights, Inc. v. Central Bank & Trust, 658 P.2d 872, 878-879 (Colo. 1983); Gude v. City of Lakewood, 636 P.2d 691 (Colo. 1981). Any such provision would have violated the Colorado Constitution and C.R.S. § 29–1–110 which prohibits a municipality from assuming future debt without legislative discretion to elect not to appropriate funds for that purpose. See Colo. Const. art. X, § 20, cl. (4)(b) (Voter approval is required in advance for the "creation of any multiple-fiscal year direct or indirect district debt or other financial obligation whatsoever without adequate present cash reserves pledged irrevocably and held for payments in all future fiscal years."); art. XI, § 6. "Financing methods involving lease-purchase or multi-year lease agreements are constitutional if the local or state government annually can choose not to renew the agreement without further obligation." Black v. First Federal Sav. and Loan Ass'n of Fargo, North Dakota, F.A., 830 P.2d 1103, 1110 (Colo. App. 1992) (underline added).

Lastly, GRMD argues "[a]t a minimum, disputed material facts exist regarding GRMD's interest which preclude entry of summary judgment as a matter of law[14]" but fails to specify what those disputed facts are and instead, provides a synopsis of the various documents and agreements involved in this case, without any analysis or discussion as to how they demonstrate that they survive foreclosure. "The party requesting summary judgment has the initial burden to demonstrate the absence of evidence in the record that supports the nonmoving party's case." Todd v. Hause, 2015 COA 105, ¶ 12. "In determining the propriety of summary judgment, the nonmoving party is entitled to all favorable inferences that may reasonably be drawn from the undisputed facts, and all doubts as to whether a triable issue of fact exists must be resolved against the moving party." Graven, 909 P.2d at 516 (underline added).

The Court finds GRMD has not met its burden to demonstrate the 2012 LPA survived foreclosure merely because it facilitated a public purpose; that it cannot be foreclosed simply because a public body contemplates eventually taking title to the property. The Court makes this conclusion with the principle in mind that Colorado courts lack the authority to compel a government body to specifically perform a contract. Wheat Ridge Urban Renewal Authority v. Cornerstone Group XXII, L.L.C., 176 P.3d 737, 744 (Colo. 2007).

In reaching this findings, the Court further concludes GRMD has not met its burden to demonstrate, as a matter of law, that any covenant or interest contained within the 2012 LPA, survives statutory foreclosure.

As such, the Court denies GRMD's Renewed Motion for Summary Judgment on Counts I, II, and III of Defendant GR Terra's Counterclaims as to the 2020 Foreclosure.

[14] GRMD's Response in Opposition to Defendant GR Terra's Motion for summary Judgment on Counts IV, V and VI of the Third Amended Complaint, pp. 16-17.

2. GR Terra's Cross Motion

The Court grants judgment in favor of GR Terra on Counts I, II, and III of GR Terra's counterclaims.

GR Terra argues the 2020 Foreclosure extinguished the 2012 LPA, as a junior encumbrance, by operation of C.R.S. § 38-38-501(1) (following a foreclosure sale, and expiration of redemption periods to lienors entitled to redeem, title to the foreclosed property vests in the holder of the certificate of purchase "free and clear of all liens and encumbrances junior to the lien foreclosed"); see First Interstate Bank, 864 P.2d at 119. "[U]pon foreclosure of a senior security interest, any subordinate leases, liens or encumbrances are extinguished once the redemption period has expired under [C.R.S. § 38-38-501]." First Interstate Bank, 864 P.2d at 119; see also Town of Grand Lake, 937 P.2d at 788.

Up to this point, the Court would have agreed with GR Terra. Neither party had provided the June 1, 2005 LPA (the "2005 LPA") or the 2005 Deed of Trust to the Court (See GRMD Statement of Additional Facts, Exs. 59 and 61). In every iteration of its complaint, GRMD makes no reference to the 2005 LPA and, instead, GRMD based all of its claims on the 2012 LPA. This is true, as well, for GR Terra's Counterclaims.

GRMD has now presented the 2005 LPA and a copy of the 2005 Deed of Trust for the Court's review. The Court turns to these documents.

The 2005 LPA granted Headwaters the right to use and acquire the Leased Premises, including the golf course, ski facilities, and improvements thereon, much like the 2012 LPA. (GRMD Statement of Additional Facts, Ex. 59). The 2005 LPA was executed contemporaneously with the 2005 Deed of Trust; the 2005 Loan Agreement between Granby Ranch Holdings ("GRH") and Redwood; the 2005 Promissory Note between GRH and Redwood; the June 2005 Amenity Fee Agreement between GRH and Headwaters; and the June 2005 Capital Facilities Fee Agreement between GRH and Headwaters. (Headwaters' Answer and Affirmative Defenses to Third Amended Complaint, Jury Demand and Counterclaims, Ex. B; GR Terra's Statement of Uncontroverted Facts, Ex. 8). The May 2005 Joint Resolution to Establish an Amenity Fee between Headwaters and GRMD was executed one month before. (GR Terra's Statement of Uncontroverted Facts, Ex. 7).

In 2006, however, GRH and Headwaters amended and restated the 2005 LPA. The 2006 LPA stated Headwaters and GRH intented to "amend, restate and supersede the Original Lease in its entirety." (Headwaters and GR Terra's Responses to GRMD's Statement of Additional Material Facts and Headwaters and GR Terra's Statement of Additional Material Facts, Ex. 40 Fourth Recital). The 2006 LPA also contained an integration clause: "This instrument shall merge all undertakings, representations, understandings, and agreements whether oral or written, between the parties hereto 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.e.).

The 2012 LPA described the 2006 LPA as the "Prior Lease." (Headwaters and GR Terra's Statement of Uncontroverted Facts, Ex. 13, Recital A). The 2012 LPA similarly states tthe parties (GRH and Headwaters) "enter into this Lease to amend, restate and supersede the Prior Lease in its entirety." (Id. Ex. 13, Recital E). The 2012 LPA also contained an identical integration clause as the one in the 2006 LPA. (Id. Ex. 13, ¶28e.).

Where a contract is unambiguous "and contains an integration clause stating that the writing constitutes the entire agreement of the parties, it must be enforced according to its terms." Moore v. Georgeson, 679 P.2d 1099, 1101 (Colo. App. 1983). "A binding completely integrated agreement discharges prior agreements to the extent that they are within its scope." Restatement (Second) of Contracts § 213(2) (1981). Indeed,

> The general rule is that where the parties enter into a written contract, all prior and contemporaneous negotiations, understandings, and verbal agreements on the same subject are merged in the written contract and extinguished. In particular, where the contract contains an integration or merger clause, the law conclusively presumes all prior and contemporaneous agreements have been merged into a written contract. Also, upon the execution of a valid substituted agreement, the original agreement becomes merged into it and is extinguished.

17A Am. Jur. 2d Contracts § 516.

Additionally, "the word 'supersede' means to 'be superior to,' 'to make obsolete, inferior, or outmoded,' 'to make void,' 'to make superfluous or unnecessary,' 'to take the place of,' or 'to cause to be supplanted in a position or function.'" Board of County Com'rs of County of San Miguel v. Roberts, 159 P.3d 800, 804 (Colo. App. 2006) (citing Webster's Third New International Dictionary at 2295 (1986)). While GRMD contends the 2005 LPA, the 2006 LPA, and the 2012 LPA are basically the same, the Court notes there are material differences between the documents; namely the 2005 LPA contained a 25-year term extending until 2030 as opposed to the 50-year term in the 2012 LPA that extended until 2062 and markedly different formulas for calculating the purchase price in the event Headwaters exercised its option to purchase. (Headwaters and GR Terra's Statement of Uncontroverted Facts, Ex. 13, ¶2; GRMD's Response in Opposition to GR Terra's Motion for Summary Judgment on Counts IV, V and VI of the Third Amended Complaint, Ex. 59, ¶2).

The 2006 and the 2012 LPA's use of the word supersede, combined with both integration clauses and the material differences in the documents, leads the Court to conclude the 2005 LPA was extinguished, with no force or effect.

GRMD contends the 2005 LPA "was an integral part of the original Loan Documents and is not, as Defendants contend, a junior lien or encumbrance. The fact that the LPA was later amended and restated does not relegate it to a junior lien." (GRMD's Reply in Support of Renewed Motion for Summary Judgment, p. 10.) GRMD does not cite any legal authority for this position. The Court performed its own legal research and did not locate any auyhority to support this premised either.

Lastly, the 2012 LPA clearly states that the 2005 Deed of Trust was prior and superior.[15]

In light of these undisputed facts, the Court finds the 2012 LPA effectively extinguished the 2006 LPA (which had extinguished the 2005 LPA). Thus, the 2012 LPA was a junior encumbrance to the 2005 Deed of Trust.

As a matter of law, the 2012 LPA was extinguished by the 2020 Foreclosure. C.R.S. § 38-38-501; see also First Interstate Bank, 864 P.2d at 119; Town of Grand Lake, 937 P.2d at 787-788.

Having concluded the 2012 LPA was extinguished by the 2020 Foreclosure, the Court need not address whether Headwaters terminated the 2012 LPA by failing to appropriate rent, by failing to operate the Amenities for more than 30 days, or whether changed circumstances justifies removal or termination of the 2012 LPA.

B. The 2012 LPA Terminated Per its Own Terms.

Even if the 2020 Foreclosure did not extinguish the 2012 LPA, the Court finds that the 2012 LPA terminated by operation of its own language.

GRMD and GR Terra argue each is entitled to summary judgment based on Sections 2 and 3 of the 2012 LPA involving the initial term, renewal terms, termination and rental amounts.

In interpreting a contract, "the primary goal of contract interpretation is to determine and effectuate the intent and reasonable expectations of the parties." Copper Mountain, Inc. v. Industrial Systems, Inc., 208 P.3d 692, 697 (Colo. 2009). The intent of the parties is determined primarily from the contractual language. People ex rel. Rein v. Jacob, 465 P.3d 1, 11 (Colo. 2020). The intent of the parties may also be evidenced by the circumstances surrounding the contract. Vallagio at Inverness Residential Condominium Association, Inc. v. Metropolitan Homes, Inc., 412 P.3d 709, 718 (Colo. App. 2015). The Court reads clauses in the context of the entire contract, "seeking to harmonize and to give effect to all provisions so that none will be rendered meaningless." Pepcol Mfg. Co. v. Denver Union Corp., 687 P.2d 1310, 1313 (Colo. 1984). When a contract is unambiguous and complete, courts may conclude that the contractual language expresses the parties' intent and will enforce the terms according to their plain meaning. People ex rel. Rein, 465 P.3d at 11.

Section 2 of the 2012 LPA states in full that:

[15] The Court has previously addressed the issue of the Subordination, Non-Disturbance and Attornment Agreement in its January 2022, "Order Granting in Park Gray Jay Ventures, LLC, Granby Prentice, LLC, and GR Terra LLC's Motion to Dismiss Second Amended Complaint." In its January 2022 Order, the Court stated that because the agreement is an unrecorded document, it cannot, as a matter of law, bind successors thereto, and "would have bound only Headwaters and GRH . . ." C.R.S. § 38-35-108.

> The initial term of this Lease with respect to the Leased Premises shall begin on the date set forth in the introductory paragraph to this Lease, and shall terminate at the end of the current fiscal year (the "Original Term"). This Lease shall automatically renew for 49 additional one-year terms coinciding with the fiscal year of the Tenant (each a "Renewal Term"), at the end of the Original Term and each Renewal Term unless the Tenant elects not to appropriate funds to pay amounts due under this Lease as set forth in Section 3.c.
>
> This Lease will terminate upon the earliest of any of the following events:
>
> a. The expiration of the Original Term or any Renewal Term due to the failure of Tenant to appropriate Amenity Fees to be paid pursuant to the terms of this Lease to continue leasing the Leased Premises for the ensuing Renewal Term;
>
> b. Default by Tenant and Landlord's election to terminate this Lease as provided herein;
>
> c. All Amenity Fees collectable under the Amenity Fee Agreements and the Fee Resolution have been collected in full;
>
> d. Payment of the Purchase Price exclusively from Amenity Fees;
>
> e. With Landlord's prior written consent, payment of the Purchase Price from sources other than Amenity Fees; or
>
> f. December 31, 2062.

(underline added). Section 3 states in full that:

> 3. a. 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.
>
> b. As used herein, "Amenity Fees" shall mean and refer to any Amenity Fee imposed pursuant to the Fee Resolution and the Fee Agreements, as the same may be amended or restated from time to time, and any other resolution adopted or agreement entered into for the purpose of imposing fees related to the use of the Leased Premises. Notwithstanding the foregoing, "Amenity Fees" shall not include any fee imposed solely for the purposes of funding operational costs related to the Leased Premises. The Parties acknowledge 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 may

fluctuate greatly from month to month and year to year. Tenant hereby covenants that it will do all things lawfully within its power to obtain, maintain and properly request and pursue the Amenity Fees.

c. The Tenant and the Landlord acknowledge and agree that the obligation of the Tenant to pay Rental Payments hereunder constitutes a current obligation of the Tenant payable exclusively from current and legally available funds and shall not in any way be construed to be an indebtedness or multiple fiscal-year obligation of the Tenant within the meaning of the provision of any constitutional or statutory limitation or requirement applicable to the Tenant. The Tenant has not hereby pledged the credit of the Tenant to the payment of the Rental Payments, which amounts are payable solely from the Amenity Fees, if and when received. During the Original Term and each Renewal Term, the chairman or president of the Tenant shall request the required appropriation from Tenant's board of directors (the "Board") for the ensuing Renewal Term and exhaust all available administrative reviews and appeals in the event such portion of the budget is not approved. If actual Amenity Fees collected during any fiscal year exceed the amount budgeted for Rental Payments for such year, the Board shall amend its budget during such fiscal year to allow for payment of such additional Amenity Fees. If the chairman or president of the Tenant periodically requests from its governing body funds to be appropriated for payment to Landlord under this Lease and, notwithstanding the making in good faith of such request in accordance with appropriate procedures and with the exercise of reasonable care and diligence, such governing body does not approve funds to be paid to Landlord for the Leased Premises, the Lease shall not be renewed and Tenant shall return the Leased Premises to Landlord in the condition, repair, appearance and working order required herein in the following manner:

i. By delivering the Leased Premises to Landlord in good condition, normal wear and tear accepted (sic); and

ii. By executing such documents as may be necessary to clear title of the encumbrances (other than the Permitted Exceptions) to the Leased Premises.

Tenant agrees to give Landlord at least 60 days' notice of non-renewal, provided that failure to give such notice shall not affect Tenant's right not to renew this Lease as herein provided.

Lastly, Section 10 sets forth circumstances in which GRH may terminate the 2012 LPA:

Notwithstanding anything to the contrary, if Tenant ever ceases to operate the Amenities on the Leased Premises for 30 days or longer, subject to damage, destruction, condemnation and eminent domain, Landlord may, in its sole discretion and after at least 10 days advance notice to Tenant (which notice may be given within 10 days after the Tenant ceases operation of the Amenities), elect

> to terminate this Lease as of such future date designated by Landlord in such notice in which event Tenant will be released of any further liability as of the date of termination; provided after receiving such notice, but prior to the termination date of the Lease, Tenant has the option of providing a notice to pay the Purchase Price within six months of the date of such notice.

GRMD contends Headwaters did not fail to appropriate rent or operate for more than 30 days, while GR Terra contends Headwaters did indeed fail in both regards. The Court addresses each argument separately.

1. Headwaters Failed to Appropriate Rent and Terminated the 2012 LPA

Headwaters failed to appropriate rent and thereby terminated the 2012 LPA.

GR Terra argues a failure to appropriate rent is within Headwaters' discretion and Headwaters has effectively done so and, therefore, Headwaters terminated the 2012 LPA.

GRMD's arguments for summary judgment are, again, confusing and the Court has done its best to understand them. GRMD essentially contends that because Headwaters continued and continues to collect Amenity Fees the 2012 LPA has not terminated because there has not been a failure to appropriate. GRMD also maintains the President of the Board of Headwaters failed to adhere to the procedural requirements set forth in Section 3 of the 2012 LPA somehow caused the 2012 LPA to remain "in full force and effect by operation of law." (GRMD Mot. Summ. J., p. 10).

The Court agrees with GR Terra.

First, as mentioned above, "[f]inancing methods involving lease-purchase or multi-year lease agreements are constitutional if the local or state government annually can choose not to renew the agreement without further obligation." Black, 830 P.2d at 1110; see also Glennon Heights, 658 P.2d at 878-879; Gude, 636 P.2d at 695. This is because Colo. Const. art. XI, § 6 states "[n]o political subdivision of the state shall contract any general obligation debt by loan in any form ... except by adoption of a legislative measure.... [N]o such debt shall be created unless the question of incurring the same be submitted to and approved by a majority of the qualified taxpaying electors voting thereon...." See also Black, 830 P.2d at 1110 ("[c]onstitutionally prohibited debt is created when 'one legislature, in effect, …obligate[s] a future legislature to appropriate funds to discharge the debt created by the first legislature").

These principles are reflected in 2012 LPA:

> This Lease shall automatically renew for 49 additional one-year terms coinciding with the fiscal year of the Tenant (each a "Renewal Term"), at the end of the Original Term and each Renewal Term unless the Tenant elects not to appropriate funds to pay amounts due under this Lease as set forth in Section 3.c.

(Headwaters and GR Terra's Stmt. of Uncotroverted Facts, Ex. 13, Sec. 2.a.). The 2012 LPA further provides

> The Tenant and the Landlord acknowledge and agree that the obligation of the Tenant to pay Rental Payments hereunder constitutes a current obligation of the Tenant payable exclusively from current and legally available funds and shall not in any way be construed to be an indebtedness or multiple fiscal-year obligation of the Tenant within the meaning of the provision of any constitutional or statutory limitation or requirement applicable to the Tenant.

(Id. at 3.c.). Thus, as a matter of law, Headwaters retained annual discretion not to appropriate rent. As such, per Section 2.a of the 2012 LPA, Headwaters could exercise that discretion to terminate the 2012 LPA. GRMD does not address the discretion argument in its reply and, therefore, GRMD has not met its burden in demonstrating Headwaters lacked the discretion not to appropriate the amenity rental fees.

Second, there are no genuine issues of material fact as to whether Headwaters failed to appropriate rent. GR Terra has established that Headwaters failed to appropriate Amenity Fees for payment of rent for calendar years 2021, 2022, and 2023. GR Terra cites to the adopted budgets for 2021, 2022, and 2023 in which there were no appropriations by Headwaters for the Lease Purchase Agreement Amenity Fees. (Headwaters and Gr Terra's Statement of Uncontroverted Facts, ¶¶ 58-64, Ex. 24).

GRMD argues that, while there might not have been any appropriations, Headwaters continued to collect Amenity Fees from lot owners in 2022[16], but GRMD has not demonstrated that collection of the fee equates to an appropriation for payment of rent under the LPA. Appropriating is to "take exclusive possession of" or "to set apart for or assign to a particular purpose or use" or "to take or make use of without authority or right." (Merriam-Webster.com Dictionary, https://www.merriam-webster.com/dictionary/appropriating - accessed 7/26/23).[17] Here, Headwaters never had the power to take exclusive possession of the Amenity Fees and was also taking it with authority and right, therefore, only the second definition applies – to set apart for or assign to a particular purpose of use. GRMD has not provided the Court with any evidence that Headwaters collected the fees and then set them aside for a particular purpose. GRMD not provided any evidence that the Amenity Fees collected in 2022 were collected or paid by GRMD or its residents. GRMD has not argued that, as a matter of law, "collection" is synonymous with "appropriation."

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[16] GRMD cites to two 2022 emails from Diane Rodriguez, accounting manager for Headwaters at Community Resource Services of Colorado, and Clint Waldron, Esq., of White Bear Tanaka & Waldron, P.C., general counsel to Headwaters, to Mylea Draper, an Escrow Officer at Title Company of the Rockies in which Mr. Waldron acknowledges that the Amenity Fee is still being collected for each new lot sale within Headwaters Metro District. (GRMD Mot. Summ. J., Ex. C). It also cites to an unaudited table reflecting "Amenity Fees Received & Deposited in Headwaters Metro District and Paid to GRH." (GRMD Statement of Additional Material Facts, Ex. 72). GRMD has not stated what this document is or where GRMD obtained the document.

[17] Colorado's "Local Government Budget Law of Colorado" C.R.S. § 29-1-102(1) defines "appropriation" as "the authorization by ordinance or resolution of a spending limit for expenditures and obligations for specific purposes."

Instead, GRMD merely argues that "these Amenity Fees should have been appropriated to make rent payments under the LPA, which clearly states in Section 3c. that 'If actual Amenity Fees collected during and fiscal year exceed the amount budgeted for Rental Payments for such year, the Board shall amend its budget during such fiscal year to allow for payment of such additional Amenity Fees.'" (GRMD Mot. Summ. J., p. 10).

The Board, however, chose not to budget for Rental Payments in 2021, 2022, and 2023.

The Court rejects GRMD's last, strained, argument that certain "defects" made by the President of the Headwaters' Board, related to adoption of the 2021, 2022 and 2023 budgets somehow negate the decision to not appropriate the fees.[18] GRMD fails to provide any legal authority to support this argument – i.e. that procedural inadequacies can undermine an adopted resolution. The 2012 LPA also does not require termination where there are deficiencies or inadequacies with Section 3.

GRMD has not met its burden to demonstrate Headwaters appropriated rental fees for 2021, 2022, and 2023.

GR Terra has met its burden in demonstrating that Headwaters failed to appropriate rental fees for these years, was within its discretion to do so, and as a consequence, the 2012 LPA automatically terminated.

2. Whether Headwaters Failed to Operate the Amenities for More than 30 Days

The Court does not address whether Headwaters failed to operate the amenities for more than 30 days because the Court has already found the 2012 LPA terminated upon Headwaters' failure to appropriate rental fees.

CONCLUSION

(1) The Court DENIES GRMD's Renewed Motion for Summary Judgment;

(2) The GRANTS GR Terra's Cross Motion for Summary Judgment and Opposition to the Renewed Motion Summary Judgment of GRMD. The Court grants judgment in favor of GR Terra and against GRMD on Counts I, II, and III of GR Terra's counterclaims.

[18] GRMD alleges Mr. Johnson failed to meet his duties under Section 3.c. of the 2012 LPA by not requesting the required appropriation from the board of directors, not exhausting all available administrative reviews, and appeals by not voting against the Budget Resolution, and not making a good faith request for the appropriation in accordance with appropriate procedures and with the exercise of reasonable care and diligence. (GRMD Mot. Summ. J., p. 9.) GR Terra argues the Headwaters' Board did follow the process with respect to Section 3 of the 2012 LPA when Headwaters rejected proposals from the Board President to amend the 2022 budget and proposed 2023 budget to appropriate funds for rent and rejected his appeal of those decisions." (GR Terra Response and Cross-Motion, p. 18; GR Terra Reply, p. 12).

(3) The Court declares the 2020 Foreclosure extinguished the 2012 LPA in its entirety and/or the 2012 LPA terminated upon Headwaters' failure to appropriate funds for rental payments for the 2021 calendar year or the ensuing calendar years;

(4) The Court declares the 2012 LPA, including any and all restrictive covenants contained therein, is hereby terminated, removed, and canceled as a cloud on title to the Leased Premises, as the same is defined in the 2012 LPA. See Zavislak v. Shipman, 362 P.2d 1053, 1055 (Colo. 1961) (courts have the equitable power "to remove or cancel restrictive covenants" when "it is shown that the restrictive covenants no longer serve the purpose for which they were imposed and are no longer beneficial to those claiming under them."). The 2020 foreclosure extinguished the 2012 LPA because the 2012 LPA was a junior encumbrance to the 2005 Deed of Trust and, thus the 2012 LPA no longer serves its purpose or benefits those claiming benefits under the 20212 LPA.

(5) C.R.C.P. 105(a) authorizes actions "'brought for the purpose of obtaining a complete adjudication of the rights of all parties thereto, with respect to any real property and for damages, if any, for the withholding of possession.'" Hinojos v. Lohmann, 182 P.3d 692, 696-7 (Colo. App. 2008). The existence of an encumbrance on the Leased Premises in the form of the 2012 LPA involves the rights of all parties to the Leased Premises. GR Terra has established ownership of the Leased Premises, free and clear of the 2012 LPA. GR Terra is, therefore, entitled to a decree quieting title to the Leased Premises. The Court hereby quiets title in GR Terra to the Leased Premises, free and clear of the 2012 LPA, including any and all restrictive covenants contained therein. GRMD has no rights to or interests in the Leased Premises, as the same is defined in the 2012 LPA.

SO ORDERED this 30th day of July, 2023.

Mary C. Hoak

Mary C. Hoak, District Court Judge

NOTICE OF APPEAL
(C.A.R. 3(d)(8) APPENDIX)

DATE FILED
May 15, 2025 7:11 PM
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ATTACHMENT #5

DISTRICT COURT, GRAND COUNTY, COLORADO P.O. Box 192/307 Moffat Avenue Hot Sulphur Springs, CO 80451 970-725-3357	DATE FILED July 30, 2023 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.; GRANBY PRENTICE, LLC; and GR TERRA, LLC.	
	▲ **COURT USE ONLY** ▲
	Case No. 2021CV30008 Division 1

ORDER GRANTING THE DEFENDANTS HEADWATER METROPOLITAN DISTRICT AND GR TERRA'S RENEWED MOTION UNDER C.R.C.P. 12(B)(1) TO DISMISS

This matter comes before the Court on the Defendant Headwaters Metropolitan District ("Headwaters") and GR Terra, LLC's ("GR Terra") Renewed Motion Under C.R.C.P. 12(b)(1) to Dismiss for Lack of Standing, filed January 25, 2023 (the "instant motion"). Headwaters and GR Terra separately filed a Statement of Uncontroverted Facts on January 25, 2023, relating to the instant motion and to their Motions for Summary Judgment. The Defendants Gray Jay Ventures, LLC ("Gray Jay") and Granby Prentice, LLC ("Granby Prentice) joined in the instant motion on January 26, 2023. The Court will refer to the Defendants Headwaters, GR Terra, Gray Jay, and Granby Prentice as the Defendants. The Plaintiff Granby Ranch Metropolitan District ("GRMD") filed a response to the Defendants' motion on February 27, 2023. GRMD filed a Response to Defendants' Statement of Uncontroverted Facts on February 26, 2023, and filed its own Statement of Additional Material Facts on February 26, 2023. Headwaters and GR Terra filed a reply on March 20, 2023, and a response to GRMD's Statement of Material Facts and Defendants' Statement of Additional Material Facts. Gray Jay and Granby Prentice joined in Headwaters and GR Terra's reply on March 20, 2023.

FACTS AND PROCEDURAL HISTORY

The Court set forth the facts of this case in two orders issued on January 28, 2022: (1) Order Granting in Part the Defendant Headwater Metropolitan District's Motion to Dismiss Second Amended Complaint Pursuant to C.R.C.P. 12(b)(1) & 5; and (2) Order Granting in Part Gray Jay Ventures, LLC, Granby Prentice, LLC, and GR Terra LLC's Motion to Dismiss Second Amended Complaint (the "Previous Orders"). The Court incorporates the Previous Orders herein. Additional facts relevant to the standing analysis herein are set forth in this Order.

In the Previous Orders, the Court determined GRMD was a third-party beneficiary to the Second Amended and Restated Lease Purchase Agreement (the "2012 LPA") between Granby Realty Holdings, LLC ("GRH") and Headwaters and GRMD, therefore, had standing. In the Previous Orders, the Court dismissed certain claims bought by GRMD against Headwaters, Gray Jay, Granby Prentice, and GR Terra. In a separate order, also issued January 28, 2022, the Court dismissed all GRMD's claims against the Defendant Redwood Capital Finance Co. ("Redwood") and the Court dismissed Redwood from this case.

On October 7, 2022, the Court granted GRMD leave to file a Third Amended Complaint. GRMD filed its Third Amended Complaint with the Court on October 13, 2022. In its Third Amended Complaint, GRMD brings breach of contract claims against Gray Jay, Headwaters, Granby Prentice, and GR Terra. GRMD also requests a declaratory judgment against Gray Jay and GR Terra that states the LPA is an installment land contract, should have been treated as a mortgage, and, therefore, could only have been terminated through a judicial foreclosure, and was not terminated through the public trustee foreclosure.[1] GRMD also requests a declaratory judgment against Headwaters, Gray Jay, GR Terra, and Granby Prentice stating the LPA is a covenant running with the land and was not terminated by foreclosure. The Defendants each filed an Answer to the Third Amended Complaint.

Headwaters brings counterclaims against GRMD for breach of the 2010 Exclusion Agreement, breach of the 2016 Letter Agreement and 2017 Master IGA[2] Termination, breach of the 2018 Waiver and Release Agreement, breach of GRMD's Service Plan or improper modification of the same, an alternative counterclaim for breach of the 2016 Second Granby IGA, and for a declaratory judgment against GRMD stating the 2012 LPA was terminated by foreclosure or, alternatively, through Gray Jay's notice of termination or, alternatively, due to Headwaters' failure to appropriate funds for rental payments for the calendar year 2021 or the ensuing years.

GR Terra brings counterclaims and requests declaratory judgment against GRMD stating the 2012 LPA was terminated by foreclosure or Gray Jay's notice of termination or Headwaters'

[1] GRMD states it brings this declaratory judgment claim solely to preserve any rights to appeal that it might have because the Court previously granted Gray Jay, Granby Prentice, and GR Terra's motion to dismiss this claim, which was fund in GRMD's Second Amended Complaint. Third Am. Compl. ¶ 79.
[2] IGA stands for intergovernmental agreement.

failure to appropriate rental payments. GR Terra also requests a declaratory judgment against GRMD stating the LPA and restrictive covenants were terminated and removed from the property. In addition, GR Terra brings counterclaims for quiet title (declaring the property is quieted in GR Terra free and clear of the LPA and any restrictive covenants therein), breach of the Service Plan or improper modification of the Service Plan, and breach of the 2018 Waiver and Release Agreement.

Through their present motion, the Defendants seek to dismiss GRMD's Third Amended Complaint.

RULING

A. Standard of Review

The Court is the trier of fact for a motion to dismiss under Colorado Rule of Civil Procedure (" C.R.C.P.") 12(b)(1) and the Court must weigh the evidence and make factual findings and conclusions of law as to its jurisdiction. Tabor Foundation v. Colorado Department. of Health Care Policy and Financing, 487 P.3d 1277, 1280 n. 3 (Colo. App. 2020); Medina v. State, 35 P.3d 443, 452 (Colo. 2001).

The Court will not hold an evidentiary hearing on the present motion. The Court declined to hold an evidentiary hearing on the third-party beneficiary status on Headwaters' initial C.R.C.P. 12(b)(1) motion and likewise declines to hold a hearing on the instant motion.

A plaintiff must satisfy two criteria to establish standing. First, the plaintiff must have suffered an injury in fact and, second, this harm must be to a legally protected interest. Ainscough v. Owens, 90 P.3d 851, 855 (Colo. 2004). A plaintiff establishes an injury in fact by alleging facts that show the defendant caused harm to the plaintiff's legally protected interest. Reeves v. City of Fort Collins, 170 P.3d 850, 851 (Colo. App. 2007). "An interest is legally protected if the constitution, common law, or statute, rule, or regulation provides the plaintiff with a claim for relief." Id. "Standing is conveyed by neither the remote possibility of a future injury nor an injury that is overly 'indirect and incidental' to the defendant's action. Ainscough, 90 P.3d at 856 (citing Brotman v. E. Lake Creek Ranch, L.L.P., 31 P.3d 886, 890-91 (Colo. 2001)). An injury that "is presently speculative and that cannot be determined until a remote time in the future, is not sufficiently direct and palpable to support a finding of injury in fact." Olson v. City of Golden, 53 P.3d 747, 752 (Colo. App. 2002).

Third-party beneficiaries may establish their standing to bring an action on a contract if (1) the parties to the agreement intended to benefit the third party, and (2) the benefit claimed is a direct and not merely incidental benefit of the agreement. SK Peightal Engineers, LTD v. Mid Valley Real Estate Solutions V, LLC, 342 P.3d 868, 872 (Colo. 2015). Intended third-party beneficiaries are those upon which the contracting parties intended to confer a benefit. Everett v. Dickinson & Co., Inc., 929 P.2d 10, 12 (Colo. App. 1996). Incidental beneficiaries are not

entitled to standing. Bear Creek Development Corp. v. Genessee Foundation, 919 P.2d 948, 952 (Colo. App. 1996).

The intent to benefit a third party may be evidenced from the terms of the contract, the surrounding circumstances, or both. Villa Sierra Condominium Ass'n v. Field Corp., 878 P.2d 161, 166 (Colo. App. 1994). Intent is a question of fact that is to be determined from the terms of the contract taken as a whole and construed in the light of the circumstances under which it was made and the apparent purpose the parties were trying to accomplish. East Meadows Co. LLC v. Greeley Irr. Co., 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)).

B. The Previous Orders

In the Previous Orders, the Court determined GRMD had standing as a third-party beneficiary under the 2012 LPA. The Court noted the 2012 LPA did not contain language either expressly creating or disavowing the existence of any third-party beneficiaries. The Court examined the circumstances surrounding the formation of the 2012 LPA to determine Headwaters and GRH's intent regarding GRMD's third-party beneficiary status. In the Previous Orders, the Court examined the 2012 LPA, the Service Plans and the 2003 Master IGA[3], the 2005 Fee Resolution, 2005 Fee Agreement, and the 2008 Granby IGA.

Several factors were relevant to the Court's prior conclusion regarding GRMD's third-party beneficiary standing. First, the Court noted the "symbiotic," "complex," and "interrelated" dual district structure and relationship between GRMD and Headwaters pursuant to the Service Plans and 2003 Master IGA, under which there was no indication the two districts were meant to operate independently. Second, the Court noted GRMD had an expectation to own the infrastructure if not transferred to the Town of Granby or another public agency upon Headwaters' dissolution under the 2003 Master IGA. Third, the Court noted the Leased Premises (as that term was defined in the Previous Orders) were for the use and enjoyment of Granby Ranch residents and taxpayers and GRMD, as alleged in the Second Amended Complaint, contained the "overwhelming majority" of such residents and taxpayers. Finally, the Court noted the Amenity Fees, imposed pursuant to the 2005 Fee Resolution and Fee Agreement, were especially relevant.

In the briefing on the instant motion, Headwaters and GR Terra advance four arguments regarding standing: first, new facts and evidence regarding the circumstances surrounding the formation of the 2012 LPA demonstrate that Headwaters and GRH did not intend to confer a direct benefit and third-party beneficiary status on GRMD; second, governing law defeats GRMD's argument that Headwaters and GRH intended to confer third-party rights to enforce a public body's contract; third, GRMD does not have rights to enforce the rights of its taxpayers

[3] Although the Court raised this issue in the Court's Order Granting in Part the Defendant Headwaters Metropolitan District's Motion to Dismiss the Second Amended Complaint, issued January 28, 2022, none of the parties to this matter has ever filed a signed or fully executed 2003 Master IGA.

and GRMD has not established an injury-in-fact to itself; and fourth, GRMD waived and relinquished any third-party rights that it had.

C. Headwater and GR Terra's Arguments regarding circumstances surrounding the formation of the 2012 LPA

The Court has reviewed Headwater and GR Terra's arguments regarding the formation of the 2012 LPA.

In the instant motion, Headwaters and GR Terra argue that additional facts and evidence disclosed or produced during discovery have bearing on the circumstances surrounding the formation of the 2012 LPA and demonstrate GRMD was not an intended third-party beneficiary. The Court finds the surrounding circumstances include both the documents considered in the Previous Orders—the original Service Plans, the 2003 Master IGA, the 2005 Fee Agreement, the 2005 Fee Resolution, and the 2008 Granby IGA—and also include documents not considered in the Previous Orders—the 2005 LPA, the 2005 Loan Agreement and Deed of Trust, the 2006 Master IGA, the 2010 Exclusion Agreement, and the 2012 Headwaters Resolution Authorizing the 2012 LPA.

This analysis necessarily involves examining several documents. In interpreting a contract, "[t]he primary goal of contract interpretation is to determine and effectuate the intent and reasonable expectations of the parties." Copper Mountain, Inc. v. Industrial Systems, Inc., 208 P.3d 692, 697 (Colo. 2009). The intent of the parties is determined primarily from the contractual language. People ex rel. Rein v. Jacobs, 465 P.3d 1, 11 (Colo. 2020). It may also be evidenced by the circumstances surrounding the contract. Vallagio at Inverness Residential Condominium Association, Inc. v. Metro. Homes, Inc., 412 P.3d 709, 718 (Colo. App. 2015). As to the contractual language, the court must give effect to the plain and generally accepted meaning of the contract terms and should be wary of "viewing clauses or phrases in isolation." Allstate Ins. Co. v. Huizar, 52 P.3d 816, 819 (Colo. 2002). Instead, the Court reads clauses in the context of the entire contract, "seeking to harmonize and to give effect to all provisions so that none will be rendered meaningless," Pepcol Mfg. Co. v. Denver Union Corp., 687 P.2d 1310, 1313 (Colo. 1984). When a contract is unambiguous and complete, courts may conclude that the contractual language expresses the parties' intent and will enforce the terms according to their plain meaning. Jacob, 465 P.3d at 11.[4]

i. The District Service Plans and the 2003 Master IGA

The Court re-examines the weight given to the 2003 Master IGA based on new evidence.

In its Previous Orders, the Court examined the original Service Plans and the 2003 Master IGA and placed significant emphasis on their provisions. The Court incorporates that

[4] Neither party raises an ambiguity issue and GRMD does not argue any document is ambiguous. Defendants Headwaters and GR Terra's Statement of Uncontroverted Facts ¶ 75.

analysis here, but also re-examines the weight the Court gave to the 2003 Master IGA based on new evidence.

The Districts' Service Plans provide the why and how each district was to function. The plans directly relate to one another and, essentially, provide for the financing and operation of "community-wide infrastructure and public facilities and services that will service the [Granby Ranch] Development." (Sol Vista Metro. Dist. No. 1 Service Plan ¶ I(A)(1); Sol Vista Metro. Dist. No. 2 Service Plan ¶ I(A)(1)).[5] The Service Plans describe the dual district structure and detail the consolidated financial management and operation of the Districts. (Sol Vista Metro. Dist. No. 1 Service Plan ¶ I(A)(5); Sol Vista Metro. Dist. No. 2 Service Plan ¶ I(A)(5)). At the time they were created, the plans reflected a symbiotic relationship between the Districts. (Sol Vista Metro. Dist. No. 1 Service Plan ¶ IV(A); Sol Vista Metro. Dist. No. 2 Service Plan ¶ IV(A)).

The Taxing District, GRMD, taxed and financed the services and infrastructure that the Service District acquired, constructed, and operated. The Service District, Headwaters, was to construct, operate, and manage the public facilities. The Town of Granby authorized the Districts to provide the following services: streets, roadways and drainage, traffic and safety protection, parks and recreation, sanitation, water, transportation, and mosquito control. (Sol Vista Metro. Dist. No. 2 Service Plan ¶ II(B)).

At the time of the original Service Plans and the 2003 Master IGA, Headwaters was the only district authorized to own or acquire the infrastructure and GRMD was the only district authorized to raise taxes. Although the Service Plans were later amended, there is no indication from the original Service Plans that Headwaters and GRMD ever were meant to operate independently from one another.

GRMD was authorized to impose a mill levy and collect fees to provide services and facilities to the Districts. (2003 Master IGA ¶ 5.1, 5.2). Said services and facilities included "ski areas and/or ski lifts, golf courses…and other recreational facilities, together with all necessary, incidental and appurtenant facilities, land, and easements…" (Sol Vista Metro. Dist. No. 2 Service Plan ¶ III(C)). In the instant motion, Headwaters points out GRMD did not finance the construction of the ski facilities and golf facilities.[6]

The plans state the relationship between Headwaters and GRMD was governed by the 2003 Master IGA[7], which clarified the responsibilities, functions, and services provided by the Districts. (Sol Vista Metro. Dist. No. 1 Service Plan ¶¶ I(A)(5), VI(a); Sol Vista Metro. Dist. No. 2 Service Plan ¶¶ I(A)(5), VI(A)). The 2003 Master IGA provided Headwaters would

[5] Defendants Headwaters and GR Terra's Statement of Uncontroverted Facts, Ex.s. 1, 2; Plaintiff's Response to Defendants' Statement of Uncontroverted Facts, ¶¶ 1-2.
[6] Also, see Defendants Headwaters and GR Terra's Statement of Uncontroverted Facts, Ex. 20.
[7] The Plaintiff's Response labels the 2003 Master IGA as Exhibit 56, but Exhibit 56 is the 2003 IGA between the Town of Granby, Headwaters, and GRMD. The 2003 Master IGA is attached as an exhibit to the Service Plans.

manage and control the construction and financing of the infrastructure and establish all necessary service charges for GRMD. (2003 Master IGA ¶ 4.2, 4.3).[8]

Headwaters would own and operate the infrastructure until it was transferred to the Town of Granby or another public agency. (2003 Master IGA ¶ 4.5). After the dissolution of Headwaters, the infrastructure would transfer and GRMD would "accept responsibility for the operation and maintenance of any Infrastructure located within the Tax District, which has not been transferred to the Town or another public agency." (2003 Master IGA ¶ 5.4).[9] In the Previous Orders, the Court found that under the 2003 Master IGA, Headwaters was not intended to permanently operate and maintain the infrastructure and GRMD intended to do so if services and facilities were not transferred to the Town of Granby or another public agency (the "Expectation Interest"). The Court, in the Previous Orders, found the Expectation Interest to be especially probative of GRH and Headwaters' intent regarding the 2012 LPA.

At the time of the Service Plans, GRMD constituted 3,563 acres of Granby Ranch's 5,000 acres.[10]

The parties do not dispute that the 2003 Master IGA was terminated by the 2006 Master IGA, which was the operative agreement between GRMD and Headwaters at the time the 2012 LPA was executed.[11] Thus, for the instant motion, the Court considers the 2003 Master IGA only to understand the context of the formation of the Districts, their original roles, and how those roles were changed by subsequent IGAs.

ii. 2005 LPA, Transfer to GRH, Loan Agreement and Deed of Trust

The Court examines the 2005 LPA, Transfer to GRH, Loan Agreement and Deed of Trust.

[8] GRMD admits that "Headwaters had no obligation under the 2003 Master IGA standing alone to acquire the Amenities" but states that when read together the with "Master IGA, Town IGA, LPA, Fee Agreements, and Fee Resolution, together with existing Colorado law, they had the obligation to act in accordance with the terms of the LPA and eventually either acquire the Amenities or allow them to be transferred to another public entity such as the Town of Granby or GRMD for public use." Defendants Headwaters and GR Terra's Statement of Uncontroverted Facts, Ex. 20 (Admission 6).

[9] GRMD admits "Headwaters had no obligation under the Service Plans standing alone to acquire the Amenities" but states when read together with the "Master IGA, Town IGA, LPA, Fee Agreements, and Fee Resolutions, together with existing Colorado law, they had the obligation to act in accordance with the terms of the LPA and eventually either acquire the Amenities or allow them to be transferred to another public entity such as the Town of Granby or GRMD for public use." Defendants Headwaters and GR Terra's Statement of Uncontroverted Facts, Ex. 20 (Admission 5).

[10] Defendants Headwaters and GR Terra's Statement of Uncontroverted Facts, ¶ 3.

[11] Defendants Headwaters and GR Terra's Statement of Uncontroverted Facts, Ex. 5 ¶ 10.5; Defendants Headwaters and GR Terra's Statement of Uncontroverted Facts ¶ 10; Plaintiff's Response to Statement of Uncontroverted Facts ¶ 10.

By 2005, Sol Vista, the original Granby Ranch developer, transferred its property to GRH, including the ski area and golf course.[12]

In 2005, Headwaters and GRH executed the first Lease Purchase Agreement (the "2005 LPA")[13], under which GRH leased to Headwaters the "ski area and golf course." (2005 LPA, ¶ 1). The 2005 LPA provided for a one year original term, with Headwaters having the option to renew for twenty-four additional one year terms. (2005 LPA ¶ 2). The 2005 LPA provided for termination based on several events, including Headwaters' failure to appropriate funds to continue leasing the Leased Premises. (2005 LPA ¶ 2(a)). It does not appear GRMD has ever asserted that it was a third-party beneficiary under the 2005 LPA.

At the same time, GRH executed a number of documents with respect to financing of Granby Ranch, including a Deed of Trust with Redwood Capital (the "2005 Deed of Trust").[14]

The parties did not attach or discuss the 2005 LPA or 2005 Deed of Trust to the Second Amended Complaint (other than relatively brief mentions of the latter) in the previous Motion to Dismiss briefing. The Court, therefore, did not consider those documents in its Previous Orders.

iii. The 2005 Fee Resolution between Headwaters and GRMD

In its Previous Orders, the Court examined the 2005 Fee Resolution between Headwaters and GRMD. The Court incorporates that analysis here.

The 2005 Fee Resolution[15] was executed "in the best interest of the Districts to acquire, lease, finance, construct, maintain, provide, operate, and/or administer" the Amenities "benefitting the property within the Districts," which included the golf course, ski area, river park and other improvements. (2005 Fee Resolution[16], p. 1). The 2005 Fee Resolution was deemed necessary "to provide for the prosperity and general welfare of the Districts and their inhabitants." (Id.).

The 2005 Fee Resolution established a $10,000 per lot fee (the "Amenity Fee") to Headwaters, to fund the Amenities for these purposes. (Id. at pp. 1-2). The revenue generated thereby was to be used "solely for the purpose of the financing the acquisition, leasing, construction, and replacement of the Amenities" and such "restriction on the use of the Amenity Fee revenues shall be absolute and without qualification." (Id. at p. 6). The resolution also detailed the priority access to the Amenities given to each residential dwelling unit for which the Amenity Fee had been paid. (Id. at p. 2).

[12] Defendants Headwaters and GR Terra's Statement of Uncontroverted Facts ¶ 11; Plaintiff's Response to Statement of Uncontroverted Facts ¶ 11.
[13] Plaintiff's Resp. to Motion for Summary Judgment on Claims IV, V, and VI, Ex. 59; also, the Plaintiff references Ex. 59 in the Plaintiff's Statement of Additional Material Facts, filed on February 26, 2023.
[14] Defendants Headwaters and GR Terra's Statement of Uncontroverted Facts, Ex. 6.
[15] Defendants Headwaters and GR Terra's Statement of Uncontroverted Facts, Ex. 7.
[16] The 2005 Fee Resolution is found in Exhibit 7 to Headwaters and GR Terra's Statement of Uncontroverted Facts.

In the Previous Orders, the Court found the 2005 Fee Resolution evidenced an intent to benefit GRMD for any acquisition, lease, and operation of the Amenities within both Districts. Headwaters was to impose and collect a fee to lease, acquire, construct, maintain, operate, or administer the Amenities and it was in the best interests of both districts to do so.

iv. The 2005 Amenity Fee Agreement between Headwaters and GRH

In the Previous Orders, the Court examined the 2005 Amenity Fee Agreement between Headwaters and GRH. The Court incorporates that analysis here.

In 2005, Headwaters and GRH executed the 2005 Amenity Fee Agreement[17], which imposed the one-time Amenity Fee per residential lot within the Districts. It provided that nothing obligated GRH to "convey, lease, or otherwise contract for any specific Amenities." (2005 Amenity Fee Agreement, Recital C).

v. 2006 Master IGA

The Court did not consider the 2006 Master IGA in its Previous Orders because the parties did not attach or discuss the 2006 Master IGA to the Second Amended Complaint or the previous Motion to Dismiss briefing. The Court now considers the 2006 Master IGA.

On June 1, 2006, Headwaters and GRMD entered into a new "District Facilities Construction and Service Agreement" ("2006 Master IGA").[18] The 2006 Master IGA specifically terminated the 2003 Master IGA (2006 Master IGA, ¶ 10.5). Paragraph 1.3 sets forth the purpose and scope of the 2006 Master IGA. The 2006 Master IGA stated, under the Service Plan, Headwaters would be responsible for the financing, construction, operation, and management of the "Facilities" for the benefit of the Districts and additionally stated its purpose was to set forth the obligation of GRMD to fully fund and Headwaters to ". . . construct, own, or transfer, and to operate and maintain, enhancements to the standard public infrastructure . . ." (2006 Master IGA, ¶ 1.3, (a), (e)).

The 2006 Master IGA consistently referred to the "Facilities" throughout. (2006 Master IGA, Recitals and ¶ 1.3). The 2006 Master IGA defined "Facilities" as "the public improvements, services and facilities generally described in the Service Plan, but excluding the Amenities." (2006 Master IGA, ¶ 2.1(u) (emphasis added)). The 2006 Master IGA defined "Amenities" as "the property and improvements which are the subject of" the 2005 LPA, "including generally the ski area and golf course…" (2006 Master IGA, ¶ 2.1(c)). The 2005 LPA defined the Leased Premises as "the premises, including the ski area and golf course…together will all improvements located thereon…"[19] (2005 LPA, ¶ 1).

[17] Defendants Headwaters and GR Terra's Statement of Uncontroverted Facts, Ex. 8.
[18] Defendants Headwaters and GR Terra's Statement of Uncontroverted Facts, Ex. 5.
[19] Exhibit A to the 2005 LPA more particularly describes the golf course and ski area.

Regarding the Amenities, the 2006 Master IGA provided GRMD was not obligated to fund the acquisition, operation, and maintenance of the Amenities, except as provided in the 2005 Fee Resolution. (2006 Master IGA, ¶ 3.10). The parties do not cite and the Court has not located a provision in the 2006 Master IGA regarding Headwaters' obligations to GRMD regarding the administration or operation or disposition of the Amenities or the 2005 LPA.

Regarding the Facilities, Headwaters "shall own all of the Facilities and shall be responsible for the operation and maintenance of all the Facilities." (2006 Master IGA, ¶ 5.1). Headwaters was authorized to sell, transfer, lease, dedicate, or convey the Facilities to another governmental or private entity. (2006 Master IGA ¶ 5.2).

In the instant motion, Headwaters contrasts the 2003 Master IGA and the 2006 Master IGA. Headwaters notes that in the Previous Orders, the Court placed significant emphasis on the language of the 2003 Master IGA that provided that upon dissolution of Headwaters, Headwaters would transfer and GRMD would accept responsibility for operation and maintenance of infrastructure located within GRMD that had not been transferred to the Town of Granby or to another public agency. Headwaters argues that, in contrast, the "2006 Master IGA did not contain the language from the 2003 Master IGA" regarding GRMD accepting responsibility for the operation and maintenance of infrastructure and the 2006 Master IGA "did not reference potential transfer of any property to GRMD." (Mot., p. 8).

GRMD does not address the differences between the 2003 Master IGA and the 2006 Master IGA or the impact of the 2006 Master IGA in its response. Instead, GRMD reiterates the language in the 2003 Master IGA that GRMD would take responsibility for operation and maintenance of infrastructure upon Headwaters' dissolution. (Resp., p. 7).

vi. The 2008 Granby IGA

In the Previous Orders, the Court examined the 2008 Granby IGA. The Court incorporates that analysis here.

The 2008 Granby IGA[20] was entered into by the Town of Granby, Headwaters, GRMD, and Granby Ranch Metro Districts 2-8. (2008 Granby IGA, p. 1). The 2008 Granby IGA reflects the relationship between the Districts, as well as the interplay between the Districts and the Town of Granby. The Districts were intended to act reciprocally and for one another's benefit. The Town and Districts "determined it to be in the best interests of their respective taxpayers, residents, and property owners to enter into this Agreement to promote the coordinated the coordinated development" of the property. (2008 Granby IGA, p. 2). Under the 2008 Granby IGA, 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

[20] Defendants Headwaters and GR Terra's Statement of Uncontroverted Facts, Ex. 21A.

maintenance facilities, fishing or 'river park' facilities and programs, and parks, trails and open space…" (2008 Granby IGA, ¶ 5(a)).

vii. The 2010 Exclusion Agreement

The Court now considers the 2010 Exclusion Agreement.[21] The Court did not consider the 2010 Exclusion Agreement in its Previous Orders because the parties did not attach or discuss the 2010 Exclusion Agreement to the Second Amended Complaint or the previous Motion to Dismiss briefing.

On April 21, 2010, Headwaters, GRMD and GRH entered into the Exclusion Agreement. (2010 Exclusion Agreement, p. 1). The Exclusion Agreement repudiated the 2008 Master IGA and reinstated the 2006 Master IGA. (2010 Exclusion Agreement, ¶ 4.1). The exclusion agreement stated under the 2006 Master IGA, Headwaters would own, operate, construct, and maintain the facilities, and GRMD would pay for costs related to construction, financing, acquisition, operation, and maintenance. (2010 Exclusion Agreement, Recitals G-H). The outstanding obligation of GRMD under the 2006 Master IGA was over $900,000 in Service Costs and over $14,000,000 in Capital Costs and an allocation reduced the Capital Costs to over $11,000,000. (2010 Exclusion Agreement, Recitals G-M). The parties agreed that on issuance of bonds in the amount of $11,119,000, "all debt obligations of GRMD to [Headwaters] under the 2006 Master IGA are hereby deeded paid in full." (2010 Exclusion Agreement, ¶ 4.2). The 2010 Exclusion Agreement provided GRMD acknowledged and agreed the Amenity Fees were payable to Headwaters and GRMD had "no right, title, or interest" to the Amenity Fees. (2010 Exclusion Agreement, ¶ 3.2.1).

viii. 2012 Headwaters Resolution

The Court now considers the 2012 Headwaters Resolution.[22] The Court did not consider the 2012 Headwaters Resolution in its Previous Orders because the parties did not attach or discuss the 2012 Headwaters Resolution to the Second Amended Complaint in the previous Motion to Dismiss briefing.

The Headwaters Board passed a Resolution Authorizing the 2012 LPA (the "2012 Headwaters Resolution"). The Headwaters Board determined the "rental amount under the Lease, the Purchase Price, or other terms of the Lease did not place the District under an economic or practical compulsion to appropriate moneys to make payments under the Lease or to exercise its option to purchase the Leased Premises pursuant to the Lease." (2012 Headwaters Resolution, ¶ 1). The 2012 Headwaters Resolution provided it shall not be construed as "creating or constituting a general obligation or multiple-fiscal year direct or indirect indebtedness or other financial obligation whatsoever of the District nor a mandatory payment obligation of the District in any ensuing fiscal year during with the Lease shall be in effect." (Id.

[21] Defendants Headwaters and GR Terra's Statement of Uncontroverted Facts, Ex. 11.
[22] Defendants Headwaters and GR Terra's Statement of Uncontroverted Facts, Ex. 12.

at ¶ 2). The 2012 Headwaters Resolution referenced the "expected eventual vesting of the fee title to the Leased Premises in the District," which was defined as Headwaters. (Id. at ¶ 1).

ix. 2012 LPA

In the Previous Orders, the Court examined the 2012 LPA. The Court incorporates that analysis here.

x. Other circumstances

GRMD argues the totality of the circumstances show Headwaters was never intended to permanently own and operate the Amenities and title would always vest in GRMD. (Resp., p. 8).

In the Previous Orders, the Court noted the Leased Premises were for the use and enjoyment of Granby Ranch residents and taxpayers and that GRMD constituted the "overwhelming majority" such residents and taxpayers, containing approximately 3,563 of Granby Ranch's 5,000 acres.[23] In the instant motion, Headwaters and GR Terra note that by the time the 2012 LPA was executed, GRMD contained 225 acres, a drastic reduction from its original size.[24] GRMD does not deny this, but states GRMD was divided into 8 separate districts, GRMD and Granby Ranch Metro. Districts 2-8 and the majority of the property in those new districts was originally in GRMD.[25] Headwaters and GR Terra note there is at least one significant subdivision within Granby Ranch that it is not within GRMD's boundaries and there are "hundreds of platted lots" not within GRMD's boundaries.[26]

Headwaters and GR Terra note that whether GRMD can establish a majority of current taxpayers is not the issue because the 2012 LPA "does not demonstrate an intent to directly benefit GRMD property owners over other property owners" or members of the public. (Mot., p. 7). Headwaters and GR Terra argue any individuals in the categories identified in the 2012 LPA were incidental to the LPA's purpose to give Headwater's the right to possess and operate the Leased Premises for the benefit of the general public. (Id.).

Although GRMD does not address the 2006 Master IGA, GRMD argues its expectation that title to infrastructure would eventually vest in GRMD was not solely evidenced by the 2003 Master IGA but was "reinforced several times through the action of the parties." (Resp., p. 7). GRMD points to statements in a 2005 meeting[27] of the Sol Vista Board, Headwaters, and GRMD reflecting the Amenities will be transferred to "the District through a lease purchase." (Ex. 57, p.

[23] Defendants Headwaters and GR Terra's Statement of Uncontroverted Facts ¶¶ 2-3; Plaintiff's Response to Statement of Uncontroverted Facts ¶ 3.
[24] Defendants Headwaters and GR Terra's Statement of Uncontroverted Facts, ¶ 3.
[25] Plaintiff's Response to Statement of Uncontroverted Facts, ¶ 3; Plaintiff's Statement of Additional Material Facts, ¶ 18.
[26] Defendants Headwaters and GR Terra's Statement of Uncontroverted Facts, ¶ 77.
[27] Plaintiff's Response labels this as Exhibit 4. The Court found this labeled as Plaintiff's Ex. 57.

3 of the document, p. 4 of the exhibit). "District" is not specifically defined in the meeting minutes as Headwaters or GRMD, but only Headwaters was a party with GRH to the 2005 LPA.

GRMD additionally points to a 2015 statement by the Headwaters' Director that the LPA would end in 2062 "to coincide with the anticipated conveyance of the Amenities (ski and golf facilities) from GRH to [Headwaters]."[28] This statement, however, was made several years after the formation of the 2012 LPA and the Court does not consider it a "surrounding circumstance" indicative of the parties' intent. GRMD argues the totality of the circumstances show Headwaters was never intended to permanently own and operate the Amenities and title would always vest in GRMD. (Resp., p. 8).

xi. Analysis

Dual District Structure and Interrelationship

At the time of the formation of the 2012 LPA, the Districts still had the complex and symbiotic relationship established by the original Service Plans. This factor is unchanged from the analysis in the Previous Orders.

GRMD Expectation of Eventual Ownership of the Amenities

GRMD's expectation interest was a significant factor in the Previous Orders, but the Court now concludes GRMD's expectation interests is not a factor supporting third-party beneficiary status for GRMD.

As discussed above, the Court previously found GRMD had an expectation of an eventual transfer of the Leased Premises and Amenities to it pursuant to the 2003 Master IGA. The 2003 Master IGA, relied on by GRMD in support of its expectation interest, was expressly superseded by the 2006 Master IGA.

The Court finds the 2006 Master IGA does not reflect GRMD's expectation interest. The 2006 Master IGA does not demonstrate any intent for Headwaters to transfer the Amenities to GRMD. The Court is not persuaded by the other documentation GRMD highlighted to support its contention that title to the Amenities would eventually vest in GRMD. GRMD has not identified any single document *actually requiring* Headwaters to acquire title to the Amenities or *actually requiring* Headwaters to transfer the Amenities to GRMD if or when titled vested.[29]

[28] Plaintiff's Response in Opposition to Defendant GR Terra's Motion for Summary Judgment on Counts IV, V and VI of the Third Amended Complaint, Ex. 64.

[29] GRMD admits Headwaters did not have an obligation to acquire the Amenities under either the 2003 Master IGA, the Service Plans, the 2016 Granby IGA "standing alone," but states when read together with the "Master IGA, Town IGA, LPA, Fee Agreements, and Fee Resolution, together with existing Colorado law, they had the obligation to act in accordance with the terms of the LPA and eventually either acquire the Amenities or allow them to be transferred to another public entity such as the Town of Granby or GRMD for public use." Defendants Headwaters and GR Terra's Statement of Uncontroverted Facts, Ex. 20 (Admission 5, 6, 7).

Rather, the documents before the Court demonstrate Headwaters could pursue several courses of action with respect to the Amenities, broadly defined to include not only the ski area and golf course but other facilities and improvements, including acquisition, leasing, construction, and installation and the documents before the Court demonstrate title to the Amenities could eventually vest in *Headwaters*, without reference to GRMD.

GRMD Use and Enjoyment

The Court finds the factor of GRMD's use and enjoyment changed from the Court's analysis in the Previous Orders. Now, the Court finds the property within GRMD's boundaries at the time of the formation of the 2012 LPA was substantially reduced from its size at the time of the original Service Plan. This new finding supports a conclusion that GRMD and its residents were incidental beneficiaries of the 2012 LPA, which provided access to the Leased Premises to the general public.

Amenity Fees

The Court concludes the surrounding circumstances do not demonstrate an intent to confer benefits, other than incidental benefits, on GRMD under the 2012 LPA.

The Court finds this factor changed from the Court's analysis in the Previous Orders. Now, the Court finds the Amenity Fees were paid directly to Headwaters and never passed through GRMD's hands.[30] Headwaters and GR Terra also state the Amenity Fees collected under the 2005 and 2013 Fee Resolutions and Agreements were paid by the seller of lots, GRH, or a large homebuilder that sold lots to buyers and that the price of the lots was not impacted by the Amenity Fee.[31] The Amenity Fee was collected out of proceeds of the sale that would otherwise go to the seller, which was in almost all cases the developer.[32] The Court

[30] Defendants Headwaters and GR Terra's Statement of Uncontroverted Facts ¶78, Ex. 28, pp. 69-71, 72-73; Plaintiff's Response to Defendants' Statement of Uncontroverted Facts ¶¶ 76-77.

[31] Defendants Headwaters and GR Terra's Supplemental Statement of Undisputed Facts ¶ 88 (found in GR Terra's Cross-Motion and Opposition to Plaintiff's Renewed Motion for Summary Judgment on Counts I, II, and III of Defendant GR Terra's Counterclaims to Third Amended Complaint, filed February 8, 2023, p. 4); Ex. 35 to GR Terra's Cross-Motion and Opposition to Plaintiff's Renewed Motion for Summary Judgment on Counts I, II, and III of Defendant GR Terra's Counterclaims to Third Amended Complaint, filed February 8, 2023, p. 238-40; Plaintiff's Response to Defendant Headwaters and GR Terra's Supplemental Statement of Undisputed Facts, ¶¶88- 90 (found in the Plaintiff's Reply in Support of Renewed Motion for Summary Judgment on Counts 1, II, and II of Defendant GR Terra's Counterclaims and Opposition to Cross-Motion, filed March 8,2023); the Plaintiff also states: "It is undisputed the Amenity Fees were paid at the time of the purchase from purchase payments that were escrowed to the closing agent and then paid to Headwaters." (Plaintiff's Reply in Support of Renewed Motion for Summary Judgment on Counts I, II, and III of GR Terra's Counterclaims and Opposition to Cross-Motion, filed March 8, 2023, p. 6).

[32] Defendants Headwaters and GR Terra's Statement of Additional Facts ¶ 90 (found in GR Terra's Cross-Motion and Opposition to Plaintiff's Renewed Motion for Summary Judgment on Counts I, II, and III of Defendant GR Terra's Counterclaims to Third Amended Complaint, filed February 8, 2023); GR Terra's Cross-Motion and Opposition to Plaintiff's Renewed Motion for Summary Judgment on Counts I, II, and II of Defendant TR Terra's Counterclaims to Third Amended Complaint, Ex. 39, p. 214-16; ¶88, Plaintiff's Reply in Support of Renewed

acknowledges the Amenity Fees could not have been imposed without GRMD's cooperation and consent as the tax district, but GRMD expressly acknowledged that it did not have any right, title, or interest in the Amenity Fees.

The Amenity Fees were a significant factor in the Previous Orders. The Court now concludes the Amenity Fees are not a factor supporting third-party beneficiary status for GRMD.

D. GRMD is Not a Third-Party Beneficiary Under the 2012 LPA and GRMD Does Not Have Standing

The governing law regarding government contracts indicates GRMD was not a direct beneficiary of the 2012 LPA and the parties did not intend to give GRMD enforceable rights, which leads the Court to conclude GRMD is not a third-party beneficiary under the 2012 LPA and does not have standing.

Headwaters and GR Terra argue the governing law demonstrates Headwaters and GRH did not intend to provide GRMD with third-party rights to enforce a public body's contract.

In the instant motion, Headwaters and GR Terra argue "granting third parties the right to enforce a public body's contract has ramifications not present in the context of private contracts" because a "government body cannot be compelled to spend money in future years." Mot., p. 10. Headwaters and GR Terra argue the 2012 LPA could not confer rights on GRMD to enforce Headwaters' payment of rent or exercise of the purchase option, as a matter of Colorado law. Id. Headwaters and GR Terra cite to the Colorado Constitution and a statute that "prohibit a municipality from assuming a future debt without legislative discretion to elect not to appropriate funds for that purpose." Id. GRMD argues Headwaters confuses GRMD's "legal rights and interests in the property" with Headwaters' "contractual obligation to make the Amenity Fees payment." Resp., p. 11. GRMD argues GRMD is not seeking specific performance against Headwaters, "just declaratory judgment and injunctive relief" that its property rights in the LPA "remain in place and have not been foreclosed out." Id.

C.R.S. § 29-1-110(1) provides no agency "shall expend or contract to expend any money, or incur any liability which . . . involves the expenditure of money in excess of the amounts appropriated" and any contract made in violation of the statute "shall be void." C.R.S. § 29-1-110(2), however, provides "multi-year contracts may be entered into where allowed by law or if subjected to annual appropriation." Thus, the statute limits a "governmental entity's power to contract without a prior appropriation of funds." Falcon Broadband, Inc. v. Banning Lewis Ranch Metropolitan District No. 1, 474 P.3d 1231, 1240 (Colo. App. 2018); Town of Alma v.

Motion for Summary Judgment on Counts 1, II, and II of Defendant GR Terra's Counterclaims and Opposition to Cross-Motion, filed March 8,2023.

AZCO Const., Inc., 10 P.3d 1256, 1266 (Colo. 2000) (the statute prohibits governmental agencies "from spending money in excess of the amounts appropriated by budget").

The Colorado Constitution provides "no political subdivision of the state shall contract any general obligation debt by loan…except by adoption of a legislative measure . . ." Colo. Const. art. XI, § 6. One of the indications of debt in a constitutional sense is "that appropriation by future legislatures of monies in payment of the obligations is nondiscretionary." Glennon Heights, Inc. v. Central Bank & Trust, 658 P.2d 872, 878 (Colo. 1983). "Financing methods involving lease-purchase or multi-year lease agreements are constitutional if the local or state government annually can choose not to renew the lease agreement without further obligation. If nothing in the agreement limits the discretion of the legislative body, there is no debt by loan." Black v. First Federal Sav. and Loan Ass'n of Fargo, North Dakota, F.A., 830 P.2d 1103, 1110 (Colo. App. 1992). In Black, the Colorado Court of Appeals held a lease that created an obligation to pay the lessor regardless of whether revenue was available and the "appropriation of monies…to meet the rental obligation was nondiscretionary" violated "the constitutional prohibition against governmental debt by loan." Id. Likewise, the Colorado Court of Appeals held a lease that specifically tied renewal of each lease term to the appropriation of sufficient funds and allowed for termination if funds were not available without further obligation did not limit the legislature's discretion, so the lease was not constitutional debt. Glennon Heights, 658 P.2d at 878-879. Discretionary obligations, therefore, are not constitutional debt. Gude v. City of Lakewood, 636 P.2d 691, 699 (Colo. 1981).

In the 2012 Resolution, the Headwaters Board determined the "rental amount under the Lease, the Purchase Price and other terms of the Lease did not place the District under an economic or practical compulsion to appropriate moneys to make payments under the Lease or to exercise its option to purchase the Leased Premises pursuant to the Lease." (Headwaters and GR Terra's Statement of Uncontroverted Facts, Ex. 12, 2012 Headwaters Resolution, ¶ 1(c)). The Resolution specifically provided the 2012 LPA did not create a financial obligation or mandatory payment obligation for Headwaters. (Id. at ¶ 2).

Likewise, the 2012 LPA[33] provided the obligation of Headwaters to pay rent "shall not in any be construed to be an indebtedness or multiple fiscal-year obligation of [Headwaters] within the meaning of any provision of any constitutional or statutory limitation or requirement applicable to [Headwaters]." (2012 LPA, ¶ 3(c)). Under the 2012 LPA, rent was "an amount equal to the proceeds of all Amenity Fees . . ." (2012 LPA, ¶ 3(a)). The 2012 LPA automatically renewed unless Headwaters "elects not to appropriate funds to pay amounts due under this Lease as set forth in Section 3.c." (2012 LPA, ¶ 2). The 2012 LPA would terminate based on Headwaters' failure "to appropriate Amenity Fees." (2012 LPA, ¶ 2(a)). If Headwaters requested funds "to be appropriated for payment" under the 2012 LPA and the Headwaters'

[33] Defendants Headwaters and GR Terra's Statement of Uncontroverted Facts, Ex. 13.

"governing body does not approve funds to be paid…the Lease shall not be renewed . . " (2012 LPA, ¶ 3(c)).[34]

In the instant motion, Headwaters argues that because Headwaters had "unfettered discretion with respect to its future performance for the LPA to be valid in the first place, the parties cannot have intended to grant third parties the right to compel Headwaters' future performance—and its future expenditure of funds—under the LPA." Mot. p. 11. Headwaters argues Headwaters and GRH did not intend to create enforceable rights in GRMD. Mot. p 12.

Although GRMD seems to argue GRMD's property interests and Headwaters' contractual obligations are separate and distinct, Headwaters' discretion to appropriate the Amenity Fees as payment under the 2012 LPA *is* the basis for any property interest in the Leased Premises. If Headwaters chose not to appropriate such funds, the 2012 LPA would terminate and would not automatically renew. A third-party beneficiary has no greater rights than the parties to the agreement itself. Bloom v. National Collegiate Athletic Ass'n, 93 P.3d 621, 625 (Colo. App. 2004) (citing United Steelworkers v. Rawson, 495 U.S. 362, 363 (1990)). GRMD could not enforce Headwaters' obligations regarding rental payment under the 2012 LPA by paying the Amenity Fee as rent itself—GRMD acknowledged in the 2010 Exclusion Agreement that it had no "right, title, or interest in" the Amenity Fees and under statute and the Colorado Constitution, the contracting governmental entity must *itself* retain the discretion to appropriate or not appropriate funds.

The Court concludes the governing law regarding government contracts indicates GRMD was not a direct beneficiary of the 2012 LPA and the parties did not intend to give GRMD enforceable rights.

The Court, therefore, concludes GRMD is not a third-party beneficiary under the 2012 LPA and does not have standing.

E. Injury

GRMD has not established injury-in-fact to its own interests sufficient to establish standing.

i. GRMD's right to enforce rights of other parties

GRMD does not assert it is enforcing its taxpayers' rights.

[34] The appropriation of rental payments pursuant to the 2021 Headwaters' budget is disputed. See Defendants Headwaters and GR Terra's Statement of Uncontroverted Facts, ¶ 57; Plaintiff's Response to Defendants Headwaters and GR Terra's Statement of Uncontroverted Facts, ¶ 57. It is undisputed that the Headwaters Board adopted budgets in 2022 and 2023 that "did not include any appropriation of funds for the payment of rent under the LPA." Defendants Headwaters and GR Terra's Statement of Uncontroverted Facts, ¶¶ 58-59; Plaintiff's Response to Defendants' Statement of Uncontroverted Facts, ¶ 57.

As discussed above, the Leased Premises were for the use and enjoyment of Granby Ranch residents and taxpayers and the Court considered this a significant factor in the Court's standing analysis in the Previous Orders. In the instant motion, Headwaters and GR Terra argue GRMD, as a quasi-municipal corporation and political subdivision of the state, does not have standing to maintain a suit on behalf of its citizens. Mot., p. 16. Headwaters and GR Terra argue GRMD has the power to sue and be sued on its own behalf, but nothing in the Special Districts Act gives special districts the power to bring suit on behalf of their citizens. Id. Headwaters and GR Terra argue GRMD must establish harm to its own interests. Id.

"Special districts are creatures of statute, and may exercise only those powers that are expressly conferred by the constitution or statute or exist by necessary implication." Tarco, Inc. v. Conifer Metropolitan District, 316 P.3d 82, 89 (Colo. App. 2013) (citing South Fork Water & Sanitation Dist. v. Town of South Fork, 252 P.3d 465, 468 (Colo.2011). A special district's implied powers are interpreted narrowly. Id. (citing Romer v. Fountain Sanitation Dist., 898 P.2d 37, 41-42 (Colo.1995) ("no implied power to seek declaratory judgment relief against the state, despite express power to sue and be sued")); Steamboat Lake Water and Sanitation Dist. v. Halvorson, 252 P.3d 497, 502 (Colo. App. 2011) (district's express power to acquire and dispose of property interests does not mean it has implied power to condemn land interest through eminent domain)).

GRMD does not assert it is enforcing its taxpayers' rights. Although GRMD does not disagree or claim it has standing to sue on behalf of residents within its boundaries, Headwaters argues GRMD continues to merge its interests with those of its residents. Reply, p. 4-5.

ii. Injury-in-Fact

GRMD has not established injury-in-fact to its own interests sufficient to establish standing.

Headwaters and GR Terra argue GRMD has not established an injury-in-fact to its own interests. Mot., p. 16. In its Third Amended Complaint, GRMD alleges "[t]he termination of the LPA will prevent GRMD from collecting fees pursuant to the LPA and will lose approximately $6.05 million dollars in equity already paid…and terminate the right of the Districts to acquire the Amenities." Third Am. Compl., ¶ 42.

Headwaters and GR Terra, however, advance several arguments as to why GRMD has not suffered an injury-in-fact to its own interests. Headwaters and GR Terra argue the Amenity Fees were paid directly to Headwaters, GRMD itself has not paid an Amenity Fee and owns no property subject to the Amenity Fees, GRMD has acknowledged that it has no right, title, or interest in the Amenity Fees, [35] payment of rent under the LPA does not equate to equity, and

[35] Defendants Headwaters and GR Terra's Statement of Uncontroverted Facts ¶¶ 20, 78-79; Plaintiff's Response to Defendants' Statement of Uncontroverted Facts ¶¶ 20, 76-77.

GRMD cannot establish any benefit to itself under the 2012 LPA. Mot., p. 17-18; see Previous Orders concluding that the 2012 LPA was not an installment land contract.

The Court agrees with Headwaters and GR Terra that GRMD has not demonstrated an injury to its own interests through the Amenity Fees. GRMD expressly recognized it did not have any right, title, or interests in the Amenity Fees, so there can be no injury to GRMD's interest on that basis.

Regarding GRMD's expectation interest, Headwaters and GR Terra argue "[a]ny alleged injury to GRMD in this regard is too indirect, contingent, and incidental to establish an injury in fact." Mot., p. 18.

The Court agrees with Headwaters and GR Terra. As noted above, the 2006 Master IGA does not contain language regarding the disposition of the Amenities or eventual GRMD ownership. Even if GRMD did expect to eventually own the Amenities on some other basis, it could only do so after Headwaters continued to exercise its discretion to appropriate rent under the 2012 LPA for the next four decades (until December 2062) or paid the purchase price and Headwaters transferred title to the Amenities to it.

The Court finds any injury to an expectation interest, if one existed, is too remote and speculative to establish an injury-in-fact, that is, any injury "is not sufficiently direct and palpable." Olson, 53 P.3d at 752.

The Court concludes GRMD has not established injury-in-fact to its own interests sufficient to establish standing.

F. Waiver and Operative Documents after 2012

GRMD waived and relinquished any rights GRMD had against Headwaters related to the Master IGAs and formation, administration, and operation of the Districts, which includes the 2012 LPA.

Headwaters argues, based on several documents executed after the 2012 LPA, that GRMD waived and relinquished any third-party beneficiary rights it had under the 2012 LPA.

"Waiver is the intentional relinquishment of a known right." Avicaana Inc. v. Mewhinney, 487 P.3d 1110, 1115 (Colo. App. 2019). Waiver may be express or implied when a party manifests an intent to relinquish a right through their conduct. Id. at 1116. If the waiver is implied, the conduct should be "'free from ambiguity and clearly manifest'" the party's intent not to assert a right. Id. In general, waiver is a question of fact. Id. at 1115. Where the facts related to waiver are undisputed and the evidence is "entirely documentary," waiver is a question of law. Id.

i. 2013 Fee Resolution and 2013 Fee Agreement

In 2013, the 2005 Fee Agreement and 2005 Fee Resolution were superseded and replaced by the 2013 Fee Agreement[36] and 2013 Fee Resolution.[37] The 2013 Fee Resolution provided the Amenity Fees would be used ". . .solely for the purpose of financing the acquisition, construction, and installation of the Amenities . . ," (2013 Fee Resolution, ¶ 8). The 2013 Fee Agreement stated it created no third-party beneficiary rights, except for Granby Ranch Metropolitan District Nos. 3-7. (2013 Fee Agreement, ¶ 21(d)).

ii. 2016 Letter Agreement

The Court now considers the 2016 Letter Agreement. The Court did not consider the 2016 Letter Agreement in its Previous Orders because the parties did not attach to or discuss the 2016 Letter Agreement in the Second Amended Complaint or the previous Motion to Dismiss briefing.

On August 22, 2016, GRH, Headwaters, GRMD, and Granby Ranch Metro Districts 2-8 entered into an agreement[38] "regarding refunding of the GRMD 2006 and 2010 Bonds, operation and maintenance of the roads in Granby Ranch, and related issues . . ." (the "2016 Letter Agreement"). (2016 Letter Agreement, p.1). The 2016 Letter Agreement provided the 2006 Master IGA would be amended or replaced "to eliminate any obligations between the parties other than GRMD's funding of road operations, maintenance and minor repairs." (2016 Letter Agreement, ¶ 5). The 2016 Letter Agreement further provided that GRMD would amend its Service Plan to "terminate any financial obligations other than road operations, maintenance and minor repairs between GRMD and Headwaters Metropolitan District." (2016 Letter Agreement ¶ 6(b)).

iii. 2016 Amendments to GRMD and Headwaters' Service Plans

On October 11, 2016, the Town of Granby approved a second amendment to the GRMD Service Plan[39] (the "2016 Second Amendment to GRMD Service Plan"). The purpose of the amendment was to note the IGA between Headwaters and GRMD "will be terminated and replaced with a road maintenance and snow removal agreement, and to clarify that the relationship between GRMD and [Headwaters] as otherwise set forth in the Service Plan is terminated and rendered null and void." (2016 Second Amendment to GRMD Service Plan, ¶ I). The original Service Plan referred to the relationship between GRMD and Headwaters concerning their respective roles and the existence of an IGA between the Districts to further detail their relationship. (2016 Second Amendment to GRMD Service Plan, ¶ II(B)). The original Service Plan was amended as a whole to clarify that the IGA between GRMD and Headwaters "will be terminated," GRMD would provide its own maintenance and operation

[36] Defendants Headwaters and GR Terra's Statement of Uncontroverted Facts, Ex. 10.
[37] Defendants Headwaters and GR Terra's Statement of Uncontroverted Facts, Ex. 9.
[38] Defendants Headwaters and GR Terra's Statement of Uncontroverted Facts, Ex. 14.
[39] Defendants Headwaters and GR Terra's Statement of Uncontroverted Facts, Ex. 17.

functions, and that GRMD would enter into an agreement with Headwaters regarding road maintenance and snow removal funding. (2016 Second Amendment to GRMD Service Plan, ¶ II(B)). The original Service Plan was amended to clarify that any obligation of GRMD to provide funds to Headwaters, other than the road maintenance and snow removal agreement, or delegation of any power or delegation of approval authority to Headwaters was "repealed and rendered null and void with the intent that any role or relationship of GRMD as a 'Tax District' and [Headwaters] as a 'Service District' is terminated." (2016 Second Amendment to GRMD Service Plan, ¶ II(B)).

On November 8, 2016, the Town of Granby approved an amendment to the Headwaters Service Plan.[40] The amendment stated the Service Plan "is amended as whole to clarify that" the IGA between Headwaters and GRMD "will be terminated" and Headwaters and GRMD "will enter into an agreement regarding funding of road maintenance and snow removal…" (2016 Amendment to Headwaters Service Agreement, ¶ III(1)). The original Service Plan was amended to clarify that "any obligation of [GRMD], other than as set forth in the road maintenance and snow removal agreement, to provide funds to the District…[is] repealed and rendered null and void with the intent that any role or relationship of [Headwaters] (as the Service District) and [GRMD] (as the Tax District) is terminated." (2016 Amendment to Headwaters Service Agreement, ¶ III)(1)).

iv. 2016 Second Granby IGA

On November 8, 2016, the Town of Granby, Headwaters, GRMD, and Granby Ranch Metro Districts 2-8 entered into the 2016 Second Granby IGA[41], which superseded and replaced the 2008 Granby IGA. (2016 Second Granby IGA, ¶ 1). Under the 2016 Granby IGA, 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…" (2016 Granby IGA, ¶ 5(a)). [42]

Headwaters and GR Terra argue the 2016 Granby IGA distinguishes between "public improvements" that were contemplated to be dedicated to Headwaters, the Town, or another public agency, and the Amenities, which were not required to be conveyed or dedicated to public use.

[40] Defendants Headwaters and GR Terra's Statement of Uncontroverted Facts, Ex. 18.
[41] Defendants Headwaters and GR Terra's Statement of Uncontroverted Facts, Ex. 21.
[42] GRMD admits "Headwaters had no obligations under the Second Granby IGA standing alone to acquire the Amenities," but states that when read together the with "the Service Plan, Town IGA, LPA, Fee Agreements, and Fee Resolution, together with existing Colorado law, they had the obligation to act in accordance with the terms of the LPA and eventually either acquire the Amenities or allow them to be transferred to another public entity such as the Town of Granby or GRMD for public use." (Defendants Headwaters and GR Terra's Statement of Uncontroverted Facts, Ex. 20, Admission 7, pp. 19-20).

v. 2017 Master IGA Termination

On November 17, 2017, Headwaters, GRMD, and Granby Ranch Metro. Dist. 2-8 entered into the Master IGA Termination.[43] The Master IGA Termination stated the parties intended for GRMD to operate independently from Headwaters and that, due to the amended service plans and intent for GRMD to operate independently, there was no further need for the Master IGAs (defined in the document as the 2006 Master IGA and 2008 Master IGA). (2017 Master IGA Termination, Recitals E-H).

The Master IGA Termination terminated the operative 2006 Master IGA and the 2008 Master IGA.[44] (2017 Master IGA Termination, ¶¶ 2 and 3). The 2017 Master Termination IGA stated the Districts had "fully satisfied their obligations under the Master IGAs" and were "released from any further obligations" under the Master IGAs. (2017 Master IGA Termination, ¶¶ 4 and 5). Each District "waives the right to recover from and generally, unconditionally, fully and irrevocably releases, waives, acquits and forever discharges each of the other Districts . . . from and against any and all costs, losses, claims, liabilities, damages, expenses, demands, debts, controversies, actions or causes of action, agreement, agreements, and promises…which has been raised or could have been raised, whether arising before, on or after the date hereof." (2017 Master IGA Termination, ¶ 5). Each provision of the 2017 Master IGA Termination was "independently, separately and freely negotiated by the Districts . . ." 2017 Master IGA Termination, ¶ 6(c)).

vi. 2018 Waiver and Release Agreement

On April 11, 2018, GRH, Headwaters, GRMD, and Granby Ranch Metro Dist. 8 entered into an agreement regarding the waiver and release of claims.[45] The agreement states GRMD issued $14.7 million in bonds in 2006 (the "Senior Bonds") and issued $11.1 million in bonds in 2010 (the "Subordinate Bonds") related to the cost of constructing public improvements. (2018 Waiver, Recital F and G). GRMD, since 2010, had not generated revenue from property taxes sufficient to pay the principal and interest payments owed on the Senior Bonds, had not made any payments on the Subordinate Bonds (owned solely by GRH), and GRH "provided for the costs of administration and operation of GRMD, [Headwaters], and [Granby Ranch Metro Dist. 8]." (2018 Waiver, Recital K, L, and M). GRH agreed to discharge the Subordinate Bonds in full. (2018 Waiver, Recital P). The agreement acknowledged, due to the status of development within GRMD and the 2016 Service Plan amendments, the Master IGAs were "no longer necessary." (2018 Waiver, Recital S).

[43] Defendants Headwaters and GR Terra's Statement of Uncontroverted Facts, Ex.19.
[44] In the Previous Orders, the Court noted it was unclear whether the 2017 Master IGA Termination terminated the 2003 Master IGA. It is now undisputed that the 2006 Master IGA terminated the 2003 Master IGA, that the operative IGA between Headwaters and GRMD was the 2006 Master IGA, and the 2017 Master IGA Termination terminated the 2006 Master IGA.
[45] Defendants Headwaters and GR Terra's Statement of Uncontroverted Facts, Ex. 22.

In the 2018 Waiver and Release Agreement, each party to the 2018 waiver "fully and forever irrevocably releases, waives, relinquishes and discharges the other Parties . . . from and against any and all claims, demands, obligations, duties, liabilities, damages, expenses, breaches of contract, acts, omissions, causes of action, promises, damages, costs, and remedies therefor of every kind . . . whatsoever now or in the future, whether known or unknown, raised or which could have been raised, which may otherwise exist or which may arise in relation to the Senior Bonds, the Subordinate Bonds, the Master IGA, the repair and operation and maintenance of roads within Granby Ranch or any other matter related to the formation, administration, and operation of the Districts…" (2018 Waiver, ¶ 1) (emphasis added). The release did not apply to the obligations in the amended Letter Agreement as amended as defined in the 2018 Waiver. (2018 Waiver, ¶ 1). The release of claims related to the formation, administration, and operation of the Districts was effective "upon the refinancing of the Senior Bonds, release and discharge of the Subordinate Bonds, and Termination of the Master IGAs." (2018 Waiver, ¶ 3(e)).

vii. Analysis

GRMD waived and relinquished any rights it had against Headwaters related to the Master IGAs and formation, administration, and operation of the Districts, which includes the 2012 LPA.

Headwaters and GR Terra argue that between 2016 and 2018, Headwaters and GRMD "ended any symbiotic relationship created under the Service Plans and terminated any obligations between them." Mot., p. 15-16. Headwaters and GR Terra state such rights were modified by agreements that GRMD was a party to and that GRMD contracted for the terms in the agreements "in exchange for valuable consideration, including GRH's forgiveness of some $11.1 [million] in outstanding bonds." Mot., p. 16.

GRMD argues the 2016 Letter Agreement, the 2017 Master IGA Termination, and the 2018 Waiver did not relate to or reference the 2012 LPA, Amenities, or the Amenity Fees. Resp., p. 12. GRMD argues from 2016 to 2018, Headwaters and its relationship changed, so Headwaters could eventually be dissolved and GRMD would independently own and operate the Amenities. Resp., p. 12-13.

The complex, symbiotic, and interrelated relationship between GRMD and Headwaters that existed as of the 2012 LPA was terminated by 2017 by operation of the 2017 Master IGA Termination and Service Plan amendments. The Districts expressly acknowledged they had fully satisfied their obligations under the Master IGAs.

The parties, by their express terms, agreed to release each other for claims arising from the administration and operation of the Districts. The Court must determine the intent of the parties by reference to the plain and ordinary language of the contract. Neither party argues the language "operation or administration of the Districts" is ambiguous. The Court finds "operation

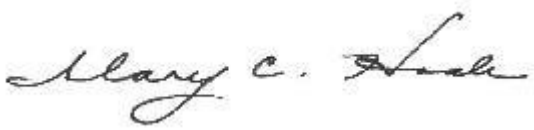
and administration of the Districts" would necessarily include Headwaters' obligations, performance, and rights under the 2012 LPA.

The Court concludes GRMD waived and relinquished any rights it had against Headwaters related to the Master IGAs and formation, administration, and operation of the Districts, which includes the 2012 LPA.

CONCLUSION

The Court GRANTS Headwaters Metropolitan District and GR Terra's Motion to Dismiss pursuant to C.R.C.P. 12(b)(1). The Court dismisses without prejudice GRMD's Third Amended Complaint in this matter.

SO ORDERED this the 30th day of July, 2023.



Mary C. Hoak, District Court Judge

NOTICE OF APPEAL
(C.A.R. 3(d)(8) APPENDIX)

DATE FILED
May 15, 2025 7:11 PM
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ATTACHMENT #6

DISTRICT COURT, GRAND COUNTY, COLORADO PO Box 192/307 Moffat Avenue Hot Sulphur Springs, CO 80451 970-725-3357	DATE FILED: December 10, 2023 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; and GR TERRA, LLC.	
	▲ **COURT USE ONLY** ▲
	Case No. 2021CV30008 Division 1

ORDER APPROVING AND MAKING AN ORDER OF THE COURT THE PARTIES' STIPULATION FOR PARTIAL DISMISSAL OF COUNTERCLAIMS

This comes before the Court on Defendants/Counterclaim Plaintiffs Headwaters Metropolitan District ("Headwaters") and GR Terra LLC ("GR Terra") and Plaintiff/Counterclaim Defendant Granby Ranch Metropolitan District's ("GRMD") (collectively, the "Parties") Stipulation for Partial Dismissal of Counterclaims. In their Stipulation, all Parties consent to the requested relief. The Court, therefore, finds and rules as follows:

The Court approves and makes an order of the Court the parties' Stipulation for Partial Dismissal of Counter claims.

The Court dismisses with prejudice Counts II and III of Headwaters' Counterclaims against GRMD filed on November 3, 2022.

Headwaters has withdrawn its claim for damages in Count IV of Headwaters'

Counterclaims against GRMD filed on November 3, 2022. Headwaters' request for injunctive relief in Count IV remains.

The Court dismisses without prejudice Counts V and VI of Headwaters' Counterclaims against GRMD filed on November 3, 2022 , on the grounds that these claims are moot and/or redundant of other claims decided by the Court.

The Court dismisses with prejudice Count V of GR Terra's Counterclaims against GRMD filed on November 3, 2022.

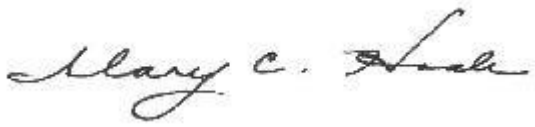
GR Terra withdraws its claim for damages in Count IV of GR Terra's Counterclaims against GRMD filed on November 3, 2022. GR Terra's request for injunctive relief in Count IV remains.

Pursuant to the Parties' Stipulation, dismissal of any of the claims identified above that the Court has dismissed with prejudice shall not be deemed an adjudication on the merits for the purposes of any fee or cost requests by any of the Parties.

Pursuant to the Parties' Stipulation, GRMD maintains its position, as stated in its October 25, 2023, Motion for Entry of Final Judgment that all claims between all parties have been resolved, and GRMD entered into the Parties' Stipulation in order to narrow the disputes between the Parties. Headwaters and GR Terra dispute GRMD's position in GRMD's October 25, 2023, Motion.

DATED this 10th day of December, 2023.

BY THE COURT



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Mary C. Hoak, District Court Judge

NOTICE OF APPEAL
(C.A.R. 3(d)(8) APPENDIX)

DATE FILED
May 15, 2025 7:11 PM
FILING ID: D4AB566039BBD
CASE NUMBER: 2025CA894

ATTACHMENT #7

DISTRICT COURT, GRAND COUNTY, COLORADO 307 Moffat Avenue/P.O. Box 192 Hot Sulphur Springs, CO 80451 970-725-3357 _____ **Plaintiff:** GRANBY RANCH METROPOLITAN DISTRICT, a quasi-municipal corporation and political subdivision of the State of Colorado, vs. **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.	DATE FILED March 3, 2025 4:49 PM CASE NUMBER: 2021CV30008 **COURT USE ONLY**
	Case No: 2021CV030008
ORDER GRANTING IN PART HEADWATERS METROPOLITAN DISTRICT'S MOTION FOR SUMMARY JUDGMENT ON COUNT I OF HEADWATERS' COUNTERCLAIMS; ORDER DENYING HEADWATERS' MOTION FOR	

SUMMARY JUDGMENT ON COUNT IV OF HEADWATERS' COUNTERCLAIMS; ORDER DENYING GR TERRA LLC'S MOTION FOR SUMMARY JUDGMENT ON COUNT IV OF GR TERRA'S COUNTERCLAIMS; ORDER DENYING GRMD'S MOTION FOR PARTIAL SUMMARY JUDGMENT REGARDING DAMAGES ON COUNT I OF HEADWATERS' COUNTERCLAIMS

This matter comes before the Court on Headwaters Metropolitan District's ("Headwaters") Motion for Summary Judgment on Counts I and IV of Its Counterclaim and GR Terra LLC's ("GR Terra") Motion for Summary Judgment on Count IV of Counterclaim, filed on July 11, 2024. Granby Ranch Metropolitan District ("GRMD") filed it response on August 15, 2024.[1] Headwaters and GR Terra filed their reply on September 12, 2024.[2] The Court also addresses herein GRMD's Motion for Partial Summary Judgment filed on July 12, 2024. Headwaters filed its response to GRMD's motion on August 15, 2024.[3] GRMD filed its reply on September 12, 2024. Both motions for summary judgment became ripe for ruling on September 13, 2024.

Upon being fully apprised of the facts and law, the court finds and rules as follows:

PROCEDURAL BACKGROUND

The Court set forth the procedural and substantive facts of this case in the Court's three orders issued on January 28, 2022, and the three orders the Court issued on July 30, 2023.

In the Court's July 30, 2023, Order Granting the Defendants Headwaters Metropolitan District and GR Terra's Renewed Motion Under C.R.C.P. 12(b)(1) to Dismiss, the Court dismissed without prejudice GRMD's Third Amended Complaint because GRMD did not have standing under the 2012 LPA, GRMD was not a third-party beneficiary thereto, and GRMD had waived and relinquished any rights it had against Headwaters related to the Master Intergovernmental Agreements ("IGA"s) and formation, administration, and operation of the Districts, which included the 2012 LPA. In a separate order issued on July 30, 2023, the Court deemed the following motions moot as a result of the Court's ruling dismissing GRMD's Third Amended Complaint: GR Terra's motion for summary judgment on GRMD's claims IV (breach of contract), V (declaratory judgment), and VI (declaratory judgment); Headwaters' motion for summary judgment on GRMD's claims II (breach of contract against Headwaters) and VI (declaratory judgment); and Gray Jay's and Granby Prentice's motion for summary judgment as to GRMD's claims III (breach of contract) and VI (declaratory judgment).

In a third July 30, 2023, Order the Court denied GRMD's renewed motion for summary judgment on Counts I, II, and III of GR Terra's counterclaims and granted GR Terra's cross-motion, entering judgment in favor of GR Terra and against GRMD on Counts I, II, and III of GR Terra's counterclaims. The Court held the 2020 foreclosure extinguished the 2012 LPA, and, even if it did not, the 2012 LPA terminated by operation of its own language because Headwaters failed to appropriate rent as required.

[1] The Court extended the time in which to file responses to August 15, 2024. (Order July 30, 2024).
[2] The Court extended the time in which to file replies to September 12, 2024. (Order August 25, 2024).
[3] GR Terra did not join in Headwater's response.

At this time, the remaining claims in this matter are Headwaters' counterclaim for damages and equitable relief for GRMD's alleged breach of the 2010 Exclusion Agreement (the "Exclusion Agreement")(Headwaters' Counterclaim I), and Headwaters and GR Terra's counterclaim for GRMD's alleged breach of the Service Plan, (Headwaters and GR Terra's Counterclaim IV).[4]

On October 25, 2023, GRMD filed a motion for entry of final judgment. GRMD argued the July 30, 2023, Orders were dispositive of all issues and counterclaims. (Mot. Entry Final Judgment, p. 3). On November 22, 2023, Headwaters filed a motion to strike GRMD's motion for entry of final judgment or an alternative response to GRMD's motion. The Court disagreed with GRMD and denied GRMD's motion for entry of final judgment on June 4, 2024. In the Court's June 4, 2024, order, the Court, however, re-opened the briefing scheduled to allow the parties to file dispositive motions regarding the remaining claims in this matter.

Headwaters now moves for summary judgment on Count I (breach of the Exclusion Agreement) of Headwaters' Counterclaims to the (now dismissed) Third Amended Complaint. Both Headwaters and GR Terra move for summary judgment on their respective Count IV's (Breach of GRMD's Service Plan or Improper Modification of Same) of their counterclaims to the (now dismissed) Third Amended Complaint.

GRMD moves for summary judgment regarding damages on Headwaters' Count I (breach of the Exclusion Agreement) of Headwaters' Counterclaims to the (now dismissed) Third Amended Complaint.

STANDARD OF REVIEW

Summary judgment shall be entered "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." Colorado Rule of Civil Procedure ("C.R.C.P.") 56(c)). Thus, "[s]ummary judgment is appropriate when the pleadings and supporting documents clearly demonstrate that no issues of material fact exist and the moving party is entitled to judgment as a matter of law." Lombard v. Colorado Outdoor Educ. Center, Inc., 187 P.3d 565, 570 (Colo. 2008); Morlan v. Durland Trust Co., 252 P.2d 98, 100 (Colo. 1952) (summary judgment is appropriate "only

[4] On December 10, 2023, per the parties' stipulation, the Court: dismissed with prejudice Counts II and III of Headwaters' Counterclaims against GRMD, which Headwaters filed on November 3, 2022; approved Headwaters withdrawal of Headwaters' claim for damages in Count IV of Headwaters' Counterclaims against GRMD filed on November 3, 2022; dismissed without prejudice Counts V and VI of Headwaters' Counterclaims against GRMD filed on November 3, 2022, on the grounds that these claims were moot and/or redundant of other claims decided by the Court; dismissed with prejudice Count V of GR Terra's Counterclaims against GRMD filed on November 3, 2022; and approved GR Terra's withdrawal of GR Terra's claim for damages in Count IV of GR Terra's Counterclaims against GRMD filed on November 3, 2022. In the Court's order, the Court noted Headwaters' request for injunctive relief in Count IV of Headwaters' counterclaims and GR Terra's request for injunctive relief in County IV of Headwaters' counterclaims both remain viable claims.

where the facts are clear and undisputed, leaving as the sole duty of the court the determination of the correct legal principles applicable thereto.").

The moving party bears the burden of establishing that there are no genuine issues of material fact. Barfield v. Hall Realty, Inc., 232 P.3d 286, 289 (Colo. App. 2010). The party must make a convincing showing that there are no genuine issues of material fact. A-1 Auto Repair & Detail, Inc. V. Bilunas-Hardy, 93 P.3d 598, 603 (Colo. App. 2004). A material fact is a fact that affects the outcome of the case. Western Innovations, Inc. v. Sonitrol Corp., 187 P.3d 1155, 1158 (Colo. App. 2008).

When "a party moves for summary judgment on an issue on which that party would not bear the burden of persuasion at trial, the moving party's initial burden of production is satisfied by showing an absence of evidence in the record to support the nonmoving party's case." Sanderson v. American Family Mut. Ins. Co., 251 P.3d 1213, 1216 (Colo. App. 2010). Once the party moving for summary judgment has made a convincing showing as to the nonexistence of material facts, the party opposing summary judgment must demonstrate with admissible facts that a real controversy of fact exists. A-1 Auto Repair, 93 P.3d at 603. In responding to a motion for summary judgment, by affidavit or otherwise, the nonmoving party ". . . must set forth specific facts showing that there is a genuine issue for trial." C.R.C.P. 56(e). All doubts as to the existence of triable issues of fact are to be resolved in favor of the nonmoving party and all inferences that may be drawn from the undisputed facts must be made in favor of the nonmoving party. A.C. Excavating v. Yacht Club II Homeowners Ass'n, Inc., 114 P.3d 862, 865 (Colo. 2005).

"When ruling on a summary judgment motion, a court may consider only sworn or certified evidence." Bjornsen v. Board of County Commissioners of Boulder County, 2019 COA 59, ¶ 14 (citing C.R.C.P. 56(e) and Cody Park Prop. Owners' Ass'n, Inc. v. Harder, 251 P.3d 1, 4 (Colo. App. 2009)); D.R. Horton, Inc.-Denver v. D & S Landscaping, LLC, 215 P.3d 1163, 1166 (Colo. App. 2008) ("'Unsworn expert witness reports are not admissible to support or oppose a motion for summary judgment.'"). Unsworn exhibits or documents attached to motions, as well as unsworn exhibits or documents attached to an unverified complaint, must be disregarded. Bjornsen, 2019 COA 59, ¶ 21. "Failure to … otherwise submit evidence establishing [a document's] admissibility precludes consideration of the document for purposes of summary judgment." St. Croix v. University of Colorado Health Sciences Center, 166 P.3d 230, 244 (Colo. App. 2007).

A party, however, can waive objection to the lack of certification or affidavit by their reliance on such exhibits. Johnson v. Mountain Sav. & Loan Ass'n, 426 P2.d 962, 963 (Colo. 1967). A court may consider record evidence where neither party disputes the competence or admissibility of the evidence offered in support of and in opposition to the summary motion. Woodward v. Board of Directors of Tamarron Ass'n of Condominum Owners, Inc., 155 P.3d 621, 624 (Colo. App. 2007); People v. Gargano, 306 P.3d 109, 110-111 n.2, n.3 (Colo. O.P.D.J. 2012) (stating that where parties do not object to the sufficiency of exhibits in summary judgment motions and responses, objections are deemed waived and the court should take such exhibits into account when making a ruling).

The Court has considered all of the exhibits filed by the parties with the parties' motions for the Court's review because none of the parties object to the others' exhibits. . Headwaters and GR Terra attached thirteen exhibits to their motion for summary judgment plus two affidavits. GRMD filed seven exhibits to GRMD's response to Headwaters and GR Terra's motion. Headwaters and GR Terra attached one exhibit to their reply. GRMD attached four exhibits to an affidavit filed with GRMD's motion for partial summary judgment. Headwaters and GR Terra attached one exhibit to their response to GRMD's motion for partial summary judgment. GRMD did not attach any documents to its reply.

RULING

The Court denies Headwaters' Motion for Summary Judgment on Counts I and IV of Headwaters' Counterclaim to the Third Amended Complaint and the Court denies GR Terra's Motion for Summary Judgment on Count IV of Counterclaim to the Third Amended Complaint.

The Court denies GRMD's Motion for Partial Summary Judgment.

The Court addresses the Exclusion Agreement in Section (I) and the GRMD 2016 Service Agreement in Section (II) of this ruling.

(I) THE EXCLUSION AGREEMENT

The Court denies Headwaters' Motion for Summary Judgment on Count I (Breach of the Exclusion Agreement) of Headwaters' Counterclaim to GRMD's Third Amended Complaint.

On April 21, 2010, Headwaters, GRMD and Granby Realty Holdings ("GRH") entered into the Exclusion Agreement. (Headwaters and GR Terra's Mot., Ex. C, p. 1). The Exclusion Agreement repudiated the 2008 Master IGA and reinstated the 2006 Master IGA. (Id. at ¶ 4.1). The Exclusion Agreement stated that under the 2006 Master IGA, Headwaters would own, operate, construct, and maintain the Facilities,[5] and GRMD would pay for costs related to the construction, financing, acquisition, operation, and maintenance of the Facilities. (Id. at Recitals G-H). The outstanding obligation of GRMD under the 2006 Master IGA was over $900,000 in service costs and over $14,000,000 in capital costs and an allocation reduced the capital costs to over $10,000,000. (Id. at Recitals G-M). The parties agreed that upon the issuance of bonds in the amount of $11,119,000, "all debt obligations of GRMD to [Headwaters] under the 2006 Master IGA" were deemed paid in full. (Id. at ¶ 4.2). Importantly, GRMD acknowledged and agreed the Amenity Fees were payable to Headwaters and that GRMD had "no right, title, or interest" to them. (Id. at ¶ 3.2.1).

Headwaters now moves the court for a determination that GRMD breached the Exclusion Agreement and that Headwaters is entitled to recover its attorneys' fees and costs as damages.

[5] The Exclusion Agreement defined the "Facilities" as the "public improvements, including streets and roadways, safety protection systems, water improvements, sanitary sewer and storm drainage, and park and recreation facilities, benefitting Granby Ranch…" (Mot. Ex. C at Recital C).

(Headwaters and GR Terra's Mot., p. 12). Headwaters does not seek a specific monetary award of damages at this time.

GRMD moves for partial summary judgment, only contending that because Headwaters' alleged damages under the Exclusion Agreement are solely for attorney fees, Headwaters' alleged damages are unrecoverable under Colorado law. (GRMD's Mot., p. 2).

(A) Headwaters has failed to demonstrate, as a matter of law, with one exception, that GRMD breached the Exclusion Agreement when GRMD filed and pursued the present lawsuit

Headwaters has failed to demonstrate, as a matter of law, with one exception, that GRMD breached the exclusion agreement when GRMD filed and pursued the present lawsuit.

Headwaters moves for summary judgment on the issue of breach – specifically, that GRMD breached Sections 3.2.1, 6.1, 6.2, and 6.3 of the Exclusion Agreement when GRMD filed the present cause of action alleging Headwaters had a duty to acquire the Amenities and sought recovery of the Amenity Fees.

GRMD contends: (a) Headwaters waived any claims for breaches of the Exclusion Agreement when it executed the 2017 Termination of Intergovernmental Agreement; (b) GRMD's obligations under the Exclusion Agreement were eliminated or terminated by the 2016 Letter Agreement, the 2016 service plans, the 2016 IGA, the 2017 Termination Agreement, and the 2018 Waiver and Release of Claims; (c) Headwaters failed to present undisputed facts that Headwaters performed, or that Headwaters' performance was excused, under the Exclusion Agreement, and Headwaters failed to present any evidence that GRMD breached the Exclusion Agreement.

(1) Headwaters has demonstrated GRMD waived GRMD's defense that the 2017 IGA Termination Agreement precludes Headwater's claims for breach of the Exclusion Agreement

Headwaters has demonstrated GRMD waived GRMD's defense that the 2017 Termination of Intergovernmental Agreement (the "2017 IGA Termination Agreement") Agreement precludes Headwater's claims for breach of the Exclusion Agreement.

GRMD argues Headwaters waived and released its claims against GRMD for breach of the Exclusion Agreement when it executed the 2017 IGA Termination Agreement. (GRMD's Resp. to Headwaters and GR Terr's Mot., p. 10). The 2017 IGA Termination Agreement, which was made between GRMD, GRMD Nos. 2-8, and Headwaters stated "the Parties intend for certain of the Granby Ranch Districts, specifically GRMD, to operate independently from" Headwaters, and "[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." (GRMD's Resp., Exh. 6, p.1 and p. 2, Recitals G and H). The 2017 IGA Termination Agreement further provided Headwaters, the Plaintiff, and GRMD Nos. 2-8

> have satisfied their obligations under the Master IGAs and are released from any further obligations thereunder. To the extent permitted by law, each District hereby waives the right to recover from and generally, unconditionally, fully and irrevocably releases, waives, acquits and forever discharges each of the other Districts, their officers and directors … from and against any and all costs, losses, claims, liabilities, damages, expenses, demands, debts, controversies, actions or causes of action, agreements, and promises, including reasonable attorneys' fees … which has been raised or could have been raised, whether arising before, on or after the date hereof.

(Response Ex. 6 § 5).

According to Headwaters, GRMD waived this argument. (Headwaters and GR Terra's Reply, p. 4).

The Court agrees.

C.R.C.P. 8(c) states the defense of waiver or release must be affirmatively pleaded. See also Rudd v. Rogerson, 424 P.2d 776, 779 (Colo. 1967). "A waiver of an asserted right must be affirmatively pleaded if it is to be used as a defense." Rudd, 424 P.2d at 779; see DeJean v. United Airlines, Inc., 839 P.2d 1153, 1161 (Colo. 1992) (holding that release must be properly asserted as an affirmative defense).

GRMD did not raise waiver or release as an affirmative defense to any of Headwaters' amended counterclaims. (GRMD Answer to Headwaters' Counterclaims, November 25, 2022). GRMD has not sought leave to amend its answer. The deadline to amend the pleadings in this matter was June 17, 2022, and there was no mention of this defense in the Case Management Order. (Case Management Order, May 5, 2022[6]). While the Court is within its discretion to disregard Headwater's objection to GRMD's waiver argument and allow an amendment of the pleadings, Town of Carbondale v. GSS Properties, LLC, 169 P.3d 675, 681 (Colo. 2007), GRMD has not sought leave to amend. The Court, therefore, finds GRMD cannot raise the 2017 Termination of Intergovernmental Agreement as a defense to Headwaters' motion for summary judgment. Id. To do so now would be to wrongly bypass C.R.C.P. 8 and 15. Id. at 680.

Even if GRMD had properly raised the defense, GRMD has not demonstrated Headwaters waived its rights to enforce the Exclusion Agreement. The 2017 IGA Termination Agreement specifically states it applies to the 2006 Master IGA and the 2008 Master IGA. (Headwaters and GR Terra's Mot., Ex. F, § 2 and § 3). Although the Exclusion Agreement is referenced once in the 2017 IGA Termination Agreement (as an agreement in which Headwaters and GRMD "repudiated the 2008 Master IGA as between them and intended to revert to the 2006 Agreement"), the Exclusion Agreement is notably absent from the "Covenants and Agreements" section wherein the 2006 and 2008 Master IGAs were expressly terminated. (Id. at Ex. F. Recital C and § 2 and § 3). There is no language in the 2017 IGA Termination Agreement

[6] There is an Amended Case Management Order issued by the Court on December 4, 2022, but the only change was in the Court's portion of the original Case Management Order.

waiving rights specific to the Exclusion Agreement. Likewise, § 5 of the 2017 IGA Termination Agreement expressly releases the districts from their obligations under the Master IGAs. Again, there is no reference to the Exclusion Agreement.

The Court finds GRMD has not demonstrated the parties intended to waive Headwater's rights to enforce the Exclusion Agreement upon execution of the 2017 IGA Termination Agreement or that Headwaters waived its right to enforce the Exclusion Agreement upon execution of the 2017 IGA Termination Agreement.

(2) Headwaters has demonstrated GRMD waived its defense that the 2016 Letter Agreement, the 2016 Service Plans, the 2016 IGA, the 2017 Termination Agreement, and the 2018 Waiver and Release of Claims eliminated its promises under the Exclusion Agreement

Headwaters has demonstrated GRMD waived its defense that the 2016 Letter Agreement, the 2016 Service Plans, the 2016 IGA, the 2017 Termination Agreement, and the 2018 Waiver and Release of Claims eliminated its promises under the Exclusion Agreement.

GRMD next argues the 2016 Letter Agreement, the 2016 Service Plans, the 2016 IGA, the 2017 Termination Agreement, and the 2018 Waiver and Release of Claims eliminated/terminated its obligations under the Exclusion Agreement. (GRMD's Resp. to Headwaters and GR Terr's Mot., p. 11).

The Court disagrees with GRMD.

GRMD has waived its assertion that these agreements terminated GRMD's Exclusion Agreement obligations. GRMD's argument fails for the same reasons set forth above: that is, GRMD was required to plead GRMD's legal argument in GRMD's Answer. An "'avoidance or affirmative defense'" is "'a legal argument that a defendant ... may assert to require the dismissal of a claim or to prevail at trial.'" Hawg Tools, LLC v. Newsco International Energy Services, Inc., 2016 COA 176M, ¶ 66; State v. Nieto, 993 P.2d 493, 507 (Colo. 2000); see also Soicher v. State Farm Mutual Automobile Insurance Company, 2015 COA 46, ¶ 18. "Under C.R.C.P. 8(c), a defendant waives all affirmative defenses and avoidances that do not appear in his or her answer." Hawg Tools, 2016 COA 176M at ¶ 41; Dinosaur Park Investments, L.L.C. v. Tello, 192 P.3d 513, 517 (Colo. App. 2008) (alleged recission of contract is an affirmative defense that is waived when not timely pleaded). In fact, avoidance, discharge and waiver are affirmative defenses which "cannot be raised by motion but only by answer…" Markoff v. Barenberg, 368 P.2d 964, 965 (Colo. 1962). GRMD did not plead GRMD's arguments as affirmative defenses under C.R.C.P. 8(c) and has not sought leave to amend its answer.

Even if GRMD had properly raised waiver and release, the Court finds GRMD has not demonstrated the documents GRMD cites eliminated GRMD's promises under the Exclusion Agreement.

The Exclusion Agreement may be terminated only by "written agreement signed by all of the parties…" to the Exclusion Agreement. (Headwaters and GR Terra's Mot. Ex. C § 9.2). GRH

was a party to and signed the Exclusion Agreement. (Id. at pages 1 and 17). The Exclusion Agreement, therefore, could not be terminated with GRH's agreement. An agreement to rescind requires a "'meeting of the minds'" of the contracting parties "with 'the clear knowledge and understanding of the parties.'" Esecson v. Bushnell, 633 P.2d 258, 261 (Colo. App. 1983). GRH was not a party to the 2016 Service Plans, the 2016 IGA, or the 2017 Termination Agreement. These documents do not support GRMD's termination argument.

GRH was a party to the 2016 Letter Agreement and the 2018 Waiver and Release Agreement. The Court now turns to these documents.

The 2016 Letter Agreement, dated August 22, 2016, reflects an understanding between the parties to amend the "Intergovernmental Agreement between [Headwaters] and GRMD dated June 1, 2006 as amended on April 21, 2010" "to eliminate any obligations between the parties other than GRMD's funding of road operations, maintenance and minor repairs." (GRMD Resp., Ex. 2, p. 4). The 2016 Letter Agreement was therefore limited to the 2006 IGA as amended. GRMD has provided no evidence to this Court indicating the 2016 Letter Agreement extended to the Exclusion Agreement.[7]

It is impossible for the Court to determine whether the 2016 Letter Agreement terminated GRMD's promises. The record reflects the 2016 Letter Agreement was amended on November 17, 2017, and again on April 11, 2018. (Ex. 22, Recital T, Statement of Uncontroverted Facts, 1/25/2024). The parties have not provided the court with these amendments, so the Court cannot determine whether the 2016 Letter Agreement terminated GRMD's promises.

The Court, therefore, finds GRMD has not demonstrated the 2016 Letter Agreement terminated GRMD's promises made pursuant to the Exclusion Agreement.

As to the 2018 Waiver and Release Agreement, GRMD has not demonstrated the 2018 Waiver and Release Agreement terminated GRMD's promises under the Exclusion Agreement. The 2018 Waiver and Release Agreement does not reference the Exclusion Agreement nor contain any language effectuating the termination of the Exclusion Agreement. Instead, the

[7] The Exclusion Agreement and the April 21, 2010, amendment to the 2006 IGA were executed on the same day. Had the parties intended for the 2016 Letter Agreement to amend the Exclusion Agreement (so as to eliminate any obligations thereunder), the 2016 Letter Agreement would have so stated.

2018 Waiver and Release Agreement contains a "waiver and release of claims" as follows:

> 1. Waiver and Release of Claims. Each Party, for itself, its respective successors, assigns, shareholders, directors, officers, employees, agents, attorneys, accountants, managers and other representatives, fully and forever irrevocably releases, waives, relinquishes and discharges the other Parties, and their respective successors, assigns, shareholders, directors, officers, employees, agents, attorneys and other representatives, including the Directors and Consultants (*collectively*, the **"Released Parties"**) from and against any and all claims, demands, obligations, duties, liabilities, damages, expenses, breaches of contract, acts, omissions, causes of action, promises, damages, costs, and remedies therefor of every kind, description, character or nature whatsoever now or in the future, whether known or unknown, raised or which could have been raised, which may otherwise exist or which may arise in relation to the Senior Bonds, the Subordinate Bonds, the Master IGA, the repair and operation and maintenance of the roads within Granby Ranch or any other matter related to the formation, administration, and operation of the Districts (the **"Claims"**) existing as of the Release Date (defined below in **Paragraph 3**). The foregoing release shall not apply to the obligations contained in the Letter Agreement as amended.

(GRMD Resp., Ex. 7, p. 3).

While this language is expansive, GRMD has not demonstrated that Headwaters' claim involves the "formation, administration, and operation of the Districts." (Court's July 30, 2023, Order Granting the Defendants Headwaters Metropolitan District and GR Terra's Renewed Motion Under C.R.C.P. 12(b)(1) to Dismiss). Headwaters' claim involves GRMD's failure to adhere to the promises GRMD made under the Exclusion Agreement – namely, its promise to refrain from administering or operating the Amenities. (Headwaters' First Counterclaim, ¶¶ 117-118). This Court questions whether a promise not to do something is the same as doing the thing itself.

The Court finds the 2018 Waiver and Release Agreement does not apply to Headwaters' breach of the Exclusion Agreement claim against GRMD because Headwaters does not seek for GRMD to administer or operate the Amenities (which is expressly waived and released in the in the 2018 Waiver and Release Agreement) and instead Headwaters seeks to prevent GRMD from administering and operating the Amenities.

GRMD has not demonstrated the 2018 Waiver and Release Agreement terminated GRMD's promises made pursuant to the Exclusion Agreement.

(3) Headwaters has partially demonstrated GRMD breached the Exclusion Agreement as a matter of law

Headwaters has partially demonstrated GRMD breached the Exclusion Agreement as a matter of law.

Headwaters argues GRMD breached Sections 3.2.1, 3.4, 4.4, 6.1, 6.2, and 6.3 of the Exclusion Agreement when GRMD filed the present cause of action alleging Headwaters had a duty to acquire the Amenities and GRMD sought recovery of the Amenity Fees.

The Court disagrees because, with one exception, Headwaters has not demonstrated Headwaters is entitled to judgment as a matter of law.

A party attempting to recover on a claim for breach of contract must prove the following elements: "(1) the existence of a contract; (2) performance by the plaintiff or some justification for nonperformance; (3) failure to perform the contract by the defendant; and (4) resulting damages to the plaintiff." W. Distributing Co. v. Diodosio, 841 P.2d 1053, 1058 (Colo. 1992) (internal citations omitted).

Section 8.1 of the Exclusion Agreement provides an "Event of Default" occurs under the agreement if a party fails to perform any of its obligations, including:

> 8.1.1. The violation of or failure to perform any material provision of this Agreement by any Party or the failure of any representation or warranty of a Party to be true;
>
> 8.1.2. The failure to pay any payment when the same shall become due and payable as provided herein and to cure such failure in accordance with Section 8.3.
>
> 8.1.3. The failure to perform or observe any other covenants, agreements, or conditions in this Agreement on the party of any Party and to cure such failure in accordance with Section 8.3.
>
> 8.1.4. Any effort by any Party …. that might reasonably be believed to result in the avoidance by court order or otherwise of any Party's obligations under this Agreement.
>
> 8.1.5. Any act or omission by and Party …. That might reasonably be believed to result in the interference in the exercise of any Party's rights hereunder; and/or
>
> 8.1.6. The failure of any Party to take such action as is required by law to enable each Party to perform its obligations hereunder …

(Headwaters and GR Terra's Mot. Ex. C, p. 10).

The Court disregards GRMD's argument that Headwaters failed to perform under the Exclusion Agreement. GRMD argues Headwaters cannot pursue these breaches because Headwaters has "failed to present undisputed facts that [Headwaters] has performed, or that its performance is excused, under the 2010 Exclusion Agreement." (Resp. to Headwaters and GR Terr's Mot., p. 14), but GRMD has not cited any section of the Exclusion Agreement GRMD contends Headwaters failed to perform.

GRMD next disputes GRMD breached Sections 3.2.1, 6.1, 6.2, and 6.3 of the Exclusion Agreement.[8] (Id. at p. 15).

Section 3.2.1 of the Exclusion Agreement provides

> Assignment and Receipt. GRMD acknowledges and agrees that the Amenity Fees are payable to [Headwaters] and GRMD has no right, title or interest thereto. Accordingly, any Amenity Fees received by GRMD shall be paid over to [Headwaters] by GRMD as soon as practical, and GRMD agrees to execute any necessary documents to assign all right, title, and interest in any Amenity Fee to [Headwaters].

(Headwaters and GR Terra's Mot. Ex. C § 3.2.1). Headwaters moves for summary judgment because GRMD alleged in GRMD's Third Amended Complaint that "[t]he termination of the LPA will prevent GRMD from collecting fees pursuant to the LPA and will lose approximately $6.05 million dollars in equity already paid (out of a purchase price of $18 million) subject to the LPA from fees collected from its residents and members and terminate the right of the Districts to acquire the Amenities." (Headwaters and GR Terra's Mot., p. 10; Third Amend. Compl. ¶ 42).[9]

According to GRMD, this section

> simply confirmed, with the forgiveness of certain bond-debt and the parties' changes, that the amenities fees, once paid, could not be clawed back by GRMD. This is confirmed by the other provisions of Section 3, which stated that the payments and obligations set out in other agreements remained in place.

[8] GRMD does not address the breaches of Section 3.4 and 4.4 of the Exclusion Agreement alleged by Headwaters in Headwaters' first counterclaim. (Headwaters' Counterclaims, p. 29). Section 3.4 provides:

> 3.4 Operations and Maintenance Levy. The Property shall not be liable for any property tax levied by GRMD for operating costs of GRMD after the effective date of the Court's order for exclusion and, in addition, shall not be liable or have any obligations for operations of GRMD of any kind.

Section 4.4 provides:

> 4.4 Conveyance of Improvements. GRMD shall convey and dedicate any public improvements for which it has ownership to [Headwaters] for ownership, operations, and maintenance. GRMD shall execute such necessary conveyance documents to transfer and public improvements and related appurtenances to [Headwaters]. Including as necessary and appropriate, special warranty deeds, bills of sale, assignment agreements, or other conveyance documents, conveying title to the public facilities, infrastructure, any property and any appurtenances thereto owned by GRMD to [Headwaters].

[9] GRMD alleged the same thing in GRMD's Second Amended Complaint: "The termination of the LPA will prevent GRMD from collecting fees pursuant to the LPA and will lose approximately $6.05 million dollars in equity already paid (out of a purchase price of $18 million) subject to the LPA from fees collected from its residents and members and terminate the right of the Districts to acquire the Amenities." (Second Amended Complaint ¶ 42).

> Again, this is wholly different than the issues raised by GRMD as to the LPA and the duties it asserted Headwaters had with regard to the amenities. That GRMD had paid Headwaters the amenity fee and had no direct right to the fee itself does not mean that Headwaters simply had no duties whatsoever. It remained bound by the LPA. The claims in this action did not breach § 3.2.1.

(GRMD Resp., p. 16).

The Court is largely underwhelmed by GRMD's argument as to Section 3.2.1 of the Exclusion Agreement. The party opposing summary judgment must demonstrate with admissible and specific facts that a real controversy of fact exists. A-1 Auto Repair, 93 P.3d at 603. In responding to a motion for summary judgment, by affidavit or otherwise, the nonmoving party ". . . must set forth specific facts showing that there is a genuine issue for trial." C.R.C.P. 56(e).

Filing a lawsuit for the recovery of the Amenity Fees is evidence that GRMD violated Section 3.2.1. GRMD agreed GRMD had "no right, title or interest" to the Amenity Fees, and agreed "any Amenity Fees received by GRMD shall be paid over to [Headwaters] by GRMD as soon as practical, and … to execute any necessary documents to assign all right, title, and interest in any Amenity Fee to [Headwaters]." (Headwaters and GR Terra's Mot., Ex. C, § 3.2.1). GRMD has not directed the court to any evidence disputing that its actions were not an attempt to collect the Amenity Fees.

The Court finds Headwaters has not demonstrated, as a matter of law, that GRMD breached Section 3.2.1. Regardless of whether there is an absence of material facts in dispute, a plaintiff must still establish all the requirements of summary judgment, including that it is entitled to judgment as a matter of law. Meyer v. State, Dept. of Revenue, Motor Vehicle Div., 143 P.3d 1181, 1184 (Colo. App. 2006). A plaintiff must demonstrate that the defendant failed to perform the contract. Diodosio, 841 P.2d at 1058.

At this stage in the proceedings, the Court finds whether GRMD breached Section 3.2.1 of Exclusion Agreement by attempting to recover Amenity Fees from Headwaters is an issue more properly reserved for trial. Headwaters has not demonstrated that an attempt to recover the Amenity Fees is a breach of Section 3.2.1. Until Headwaters provides the court with case law that an attempt at a breach is the same thing as an actual breach, summary judgment is improper. Headwaters has not argued or demonstrated any Amenity Fees were paid to GRMD or GRMD received any Amenity Fees. Headwaters has not argued or demonstrated that GRMD failed to execute the necessary documents to assign its right, title, and interest in the Amenity Fees to Headwaters.

Headwaters next contends GRMD breached Section 6.1 and 6.2 of the Exclusion Agreement by pursuing claims against Headwaters. (Headwaters and GR Terra's Mot., p. 19). These sections provide:

> 6.1 O&M Services. [Headwaters] and GRMD agree that consistent with the Service Plan, the Town IGA, and the 2006 Master IGA, [Headwaters] shall

> provide all general administrative services, operation and maintenance services, and Facilities for GRMD, and GRMD shall impose property taxes, fees, rates, tolls or charges and take other actions in cooperation with [Headwaters] that may be necessary to fund the O&M Costs and allow [Headwaters] to provide, operate and maintain the Facilities. GRMD agrees that it shall not attempt to provide, independent of [Headwaters], any operation and maintenance services for the Facilities.
>
> 6.2 Access to Improvements. GRMD shall not interfere with the operations and maintenance responsibilities of [Headwaters] and shall not impair [Headwaters]'s access to any Facilities through the adoption of any rules, regulations, policies, procedures or other action reasonably interpreted by [Headwaters] to impair [Headwaters]'s access, or access granted by [Headwaters] to others, to any Facilities.

(Id., Ex. C, § 6.1, 6.2).

"Facilities" is defined in the Exclusion Agreement as the "public improvements, including streets and roadways, safety protection systems, water improvements, sanitary sewer and storm drainage, and park and recreation facilities, benefitting Granby Ranch…" (Id. at Recital C).

The Court denies summary judgment as to these alleged breaches of Section 6.1 and 6.2 of the Exclusion Agreement because Headwaters has not demonstrated GRMD can interfere with a contractual obligation that no longer exists or that GRMD can attempt to provide contractual services that have since terminated.

The Court, therefore, questions whether a party can interfere with the responsibilities of another when those responsibilities have terminated. In 2020, Headwaters ceased to operate for 30 days and, per the 2012 LPA, was, therefore, no longer required to operate and maintain the ski area and golf course. (See Headwaters and GR Terra's Mot., p. 9, ¶ 25 and Ex. H). Interfere is defined as " to enter into or take a part in the concerns of others; to interpose in a way that hinders or impedes: come into collision or be in opposition" Merriam-Webster.com Dictionary, Merriam-Webster, https://www.merriam-webster.com/dictionary/interfere. Accessed February 15, 2025. The definition necessarily implies that the hindrance or impediment must be to an on-going process of some kind. This is also true for the phrase "attempt to provide." Here, the process – the operation and maintenance of the ski area and golf course – had terminated. Headwaters has not provided any legal authority that GRMD could "attempt to provide" or interfere with operation and maintenance services when Headwater's obligations to provide those services had ceased. Headwaters has not provided any legal authority as to whether the imposition of responsibilities that no longer exist amounts to a breach of contract.

The Court finds Headwaters has not demonstrated, as a matter of law, that GRMD breached Sections 6.1 and 6.2 of the Exclusion Agreement by initiating and pursuing the present lawsuit.

Headwaters has demonstrated GRMD breached Section 6.3 of the Exclusion Agreement.

Headwaters next argues GRMD's "vigorous" pursuit of this lawsuit for more than three years was a breach of Section 6.3 and an event of default under § 8.1 of the Exclusion Agreement. (Headwaters and GR Terra's Mot., p. 21). Section 6.3 of the Exclusion Agreement provides "[n]either GRMD nor [Headwaters] shall interfere with or restrict future construction or development with the Granby Ranch development." Headwaters cites to:

- GRMD's Lis Pendens which created a cloud on title of the Amenities. The lis pendens made "obtaining any traditional bank financing impossible and decreased the value of the Property." (Id. at p. 13). GR Terra was unable to obtain a loan to purchase the Property, had to pursue non-traditional funding sources at a greater cost and on a delayed timeline, and was met with delays in obtaining financing for improvements. (Id.). The cloud on title also delayed major capital improvements to the ski and golf facilities including construction of new grip bay house for the ski facilities, installation of new "magic carpet" for the ski facilities; and major improvements to Base Camp Lodge (Id. at p.14);
- Significant legal expenses, which Headwaters contends delayed development of the Property (funds diverted to the present lawsuit could have been invested in the development). (Id.). Counsel contends legal expenses for Headwaters and GR Terra presently amount to $2,176,001 (Id.);
- The cancellation of several residential home contracts (Id.); and
- Lenders requiring "additional due diligence, additional assurances, and more significant guarantees before extending financing for improvements, on terms less favorable than financing not hindered by a cloud on title." (Id.)

(Id., Ex. A, ¶ 9-10).

GRMD contends these facts are deficient, vague, and self-serving because they don't specify "what loans could not be obtained, when, what interest rate would have been available, what substitutes were obtained and what were there terms)" and that "[t]his is insufficient to demonstrate breach." (Resp. Headwaters and GR Terra's Mot., p. 17).

The Court disagrees with GRMD.

Headwaters attached an affidavit to its Motion for Summary Judgment explaining how this litigation and the related lis pendens have inhibited construction and financing, deterred home buyers from purchasing residences, and diverted funds for litigation expenses that otherwise could have been invested in the development. (Headwaters and GR Terra's Mot., p. 13; Mot. Ex. A ¶ 9-10). This is evidence that GRMD interfered with or restricted "future construction or development with the Granby Ranch development" and GRMD has not provided any evidence rebutting the same. (Headwaters and GR Terra's Mot., p. 5).

GRMD next argues that any breach of Section 6.3 was not a breach of a duty owed to Headwaters. (GRMD's Resp. to Headwaters and GR Terra's Mot., p. 17 "[t]here is no allegation that Headwaters incurred costs, that it could not perform its duties, that it had losses, that its actions were impeded. (Again, by the time litigation was undertaken, Headwaters asserts it was

not operating the amenities.")). GRMD fails to set forth any legal authority as to breach of contract and to whom contractual obligations are owed.

The Court, therefore, rejects this argument and finds Headwaters has demonstrated GRMD breached Section 6.3 of the Exclusion Agreement. The Court further finds Headwaters is entitled to summary judgment as to this specific breach because GRMD failed to meet its burden to establish a triable issue of material fact or to demonstrate that Headwaters was not entitled to judgment as a matter of law. McDonald v. Zions First National Bank, N.A., 2015 COA 29, ¶ 79; see Daugaard Real Estate, Inc. v. Lewis, 533 P.2d 935, 936 (a statement in an affidavit controls against an allegation in the complaint where the affidavit stands uncontradicted (citing C.R.C.P. 56(e)); In re Marriage of Vittetoe, 2016 COA 71, ¶ 39 (perfunctorily asserted and unsupported legal arguments will not be considered).

(B) The Exclusion Agreement Authorizes the Recovery of Attorney's Fees and Costs as Damages for GRMD's Alleged Breach of the Exclusion Agreement

The Court denies GRMD's motion for partial summary judgment. The Exclusion Agreement authorizes Headwaters' recovery of attorney' fees and costs as damages for GRMD's alleged breach of the Exclusion Agreement.

Headwaters and GRMD both move for summary judgment on whether Headwaters can recover its attorney fees and costs as damages. (Headwaters and GR Terra's Mot., p. 22; GRMD Mot., p. 6).[10]

A plaintiff must demonstrate resulting damages to succeed on its claim for breach of contract. Diodosio, 841 P.2d at 1058.[11] Here, there is no dispute that Headwaters' damages are limited to its attorneys' fees and costs incurred in defending against GRMD's claims and asserting its own counterclaims.

In Colorado, each party is to bear their own legal expenses. Bernhardt v. Farmers Ins. Exchange, 915 P.2d 1285, 1287 (Colo. 1996); Bunnett v. Smallwood, 793 P.2d 157, 160 (Colo. 1990) (collecting cases) ("In the absence of a statute or private contract to the contrary, attorney fees and costs generally are not recoverable by the prevailing party in a breach of contract case."); Allstate Ins. Co. v. Huizar, 52 P.3d 816, 818 (Colo. 2002); Southern Colorado

[10] GRMD made the same argument in its motion for entry of judgment, filed on October 25, 2023, but the Court did not address the argument at that time. In that motion, GRMD argued that because Headwaters seeks only attorneys' fees as damages, Headwaters cannot prevail on counterclaim I because the Exclusion Agreement does not "contain an express, unambiguous fee-shifting provision" permitting an award of attorneys' fees as damages. (Mot. for Entry of Judgment, p. 12). In its Order denying that motion, the Court rejected this argument because GRMD's cited testimony demonstrated only that Headwaters seeks attorneys' fees as damages "[a]s of now" and the legal team was seeking other damages, in addition to the attorney fees. (Court's Order Denying GRMD's Motion for Entry of Final Judgment, issued June 4, 2024, p. 5). The Court, therefore, at that time, did not address whether the Exclusion Agreement provides for such an award.

[11] A party attempting to recover on a claim for breach of contract must prove the following elements: (1) the existence of a contract; (2) performance by the plaintiff or some justification for nonperformance; (3) failure to perform the contract by the defendant; and (4) resulting damages to the plaintiff. Diodosio, 841 P.2d at 1058.

Orthopaedic Clinic Sports Medicine and Arthritis Surgeons, P.C. v. Weinstein, 2014 COA 171, ¶ 10 ("Colorado courts follow the American rule, which requires parties to a lawsuit to pay their own legal expenses.").

Conversely, attorney fees are recoverable where there is a "specific contractual, statutory, or procedural rule" providing for them. Waters v. District Court for the Seventeenth Judicial Dist., 935 P.2d 981, 990 (Colo. 1997); see also Burnett, 793 P.2d at 162-163; Continental Western Ins. Co. v. Heritage Estates Mut. Housing Ass'n, Inc., 77 P.3d 911, 913 (Colo. App. 2003) (". . . the parties may agree otherwise by express provision in their contract."). Any agreement for fees must establish a plain and unambiguous basis for the award. Allstate Ins. Co. v. Orban, 855 P.2d 9, 11 (Colo. App. 1992).

A party may recoup attorney fees as damages if the contract provides for their specific recovery or if the fees are a legitimate consequence of the breach. "Attorney fees are neither costs nor damages, but a hybrid of each." Butler v. Lembeck, 182 P.3d 1185, 1189 (Colo. App. 2007). In the absence of any contractual or statutory liability, attorney fees and costs are not recoverable as an item of damages either in a contract or a tort action. Lawry v. Palm, 192 P.3d 550, 568 (Colo. App. 2008). Attorney fees are generally not considered actual damages "'because they are not the legitimate consequences of the tort or breach of contract sued upon.'" Bunnett, 793 P.2d at 160.

"It is axiomatic that a contract should be interpreted 'according to the plain and ordinary meaning of its terms.'" Morris v. Belfor USA Group, Inc., 201 P.3d 1253, 1259 (Colo. App. 2008); see In re Estate of Gattis, 2013 COA 145, ¶ 36. The court's primary task in interpreting an agreement is to determine the parties' intent, which is ascertained "' from the language of the instrument itself'" and in harmony with the plain and generally accepted meaning of the words employed. Johnson Nathan Strohe, P.C. v. MEP Engineering, Inc., 2021 COA 125, ¶ 12; see French v. Centura Health Corporation, 2022 CO 20, ¶ 25. The court will enforce agreements as written if their meaning is clear. FD Interests, LLC v. Fairways at Buffalo Run Homeowners Association, Inc., 2019 COA 148, ¶ 23 (quoting Pulte Home Corp. v. Countryside Cmty. Ass'n, 2016 CO 64, ¶ 23, 382 P.3d 821).

Section 8.5.2 of the Exclusion Agreement provides:

> The Parties may protect and enforce their rights under this Agreement by such suit, action, or special proceeding as they shall deem appropriate, including without limitation any proceeding for specific performance of any covenant or agreement contained herein, for the enforcement of any other appropriate legal or equitable remedy, or for the recovery of damages caused by breach of the Agreement, including attorney's fees and all other costs and expenses incurred in enforcing this Agreement.

(Headwaters and GR Terra's Mot., Ex. C, § 8.5.2.).

GRMD argues this language cannot serve as a basis to award fees because it is unclear and ambiguous. (GRMD's Mot., p. 9). According to GRMD, there is no agreement to shift fees,

Section 8.5.2. does not state fees will be awarded, and Section 8.5.2 does not contain any prevailing party language. (Id. at p. 12). Instead, GRMD contends Section 8.5.2 is a "reservation of rights" that does not provide a basis for an award of attorneys' fees. (GRMD's Mot., p. 8; GRMD Resp., p. 18).

First, the Court disagrees that Section 8.5.2. is ambiguous. GRMD has not set forth any legal authority that an agreement for the recovery of attorney fees must contain specific language as to prevailing parties or shifting fees or any other formulaic language. Section 8.5.2. plainly and explicitly authorizes remedies to enforce the Exclusion Agreement and authorizes the recovery of attorney fees and costs incurred to enforce the Exclusion Agreement as damages for any breach. Section 8.5.2. is the clear and unambiguous contractual basis for Headwaters to seek an award of attorneys' fees and costs. The Court finds Section 8.5.2. unambiguous and finds Section 8.5.2 "'clearly informs the parties that a breach . . . my result in an award of attorney fees.'" Morris, 201 P.3d at 1260. "Unambiguous contract terms must be applied as written, according to their plain and ordinary meaning." Western Stone & Metal Corp. v. DIG HP1, LLC, 465 P.3d 105, 107 (Colo. App. 2020).

Second, the Court disagrees that Section 8.5.2 is a reservation of rights, as a matter of law. GRMD has not cited any legal authority on reservation of rights, how such a reservation differs from Section 8.5.2, or that a reservation of rights cannot serve as a basis for an award. Most importantly, GRMD has not provided any authority that a contractual reservation of rights precludes the recovery of attorneys' fees and costs. Such a showing is insufficient for a grant of summary judgment because GRMD must demonstrate, as a matter of law, not only that Section 8.5.2 is a reservation of rights but also that a reservation of rights is an insufficient basis to award attorneys' fees.

GRMD also argues Headwater's fees are not the "legitimate consequence" of GRMD's alleged breach. **(**GRMD Resp., p. 5).

> If attorney fees are part of the substance of a lawsuit and are sought as a legitimate consequence of the tort or breach of contract sued upon, they are damages …. However, if attorney fees are sought based on a contractual agreement to shift fees to a prevailing party, they should be treated as costs, at least where the fee-shifting contractual provision is not the subject of the dispute between the parties and the contract itself is proved to exist.

Butler v. Lembeck, 182 P.3d 1185, 1189 (Colo. App. 2007); Guarantee Trust Life Insurance Company v. Estate of Casper by and through Casper, 418 P.3d 1163, 1172 (Colo. 2018) (Where the recovery of attorneys' fees is the "legitimate consequence" of the suit, the fees and costs are deemed to be actual damages).

GRMD argues, in a footnote, that Headwaters has failed to demonstrate Headwaters' fees and costs are the "legitimate consequence" of GRMD's breach of the Exclusion Agreement. **(**GRMD Resp., p. 18, fn. 8). GRMD does not specify how or why the fees are not a legitimate consequence of GRMD's breach and, instead, GRMD focuses on its contention that Section 8.5.2 is a fee-shifting provision that this Court should treat as costs.

The Court is unconvinced. Section 8.5.2 of the Exclusion Agreement expressly provides either party may enforce their respective rights by "suit, action, or special proceedings" including "the recovery of damages caused by breach of this Agreement, including attorney's fees and all other costs and expenses incurred in enforcing this Agreement." (Headwaters and GR Terra's Mot., Exh. C.). The attorney fees here are likely recoverable because they are part of the substance of Headwater's claims – that is, Headwaters sought to enforce and protect its rights under Exclusion Agreement, including the recovery of "damages caused by the breach [of the Exclusion Agreement], including attorney's fees and all other costs and expenses incurred in enforcing" the Exclusion Agreement. (Headwaters Count I, Counterclaims filed November 3, 2022). The Court finds GRMD has not demonstrated Headwaters may not seek its attorneys' fees in enforcing and protecting Headwaters' rights under the Exclusion Agreement because Headwaters' fees are the subject of its counterclaim and "the fees represent a specific benefit of the contract breached by the opposing party." See Bernhard v. Farmers Ins. Exchange, 915 P.2d 1285, 1288 (Colo. 1996) (citing Bunnett, 793 P.2d at 161).

In sum, the Court finds Headwaters has demonstrated the Exclusion Agreement authorizes the recovery of damages caused by breach of the Exclusion Agreement, which recovery includes "attorney's fees and all other costs and expenses incurred in enforcing" the Exclusion Agreement." (Headwaters Count I, Counterclaims filed November 3, 2022). GRMD has not demonstrated Section 8.5.2 is a reservation of rights that precludes an award of attorneys' fees or the attorneys' fees and costs are not a legitimate consequence of GRMD's alleged breach of the Exclusion Agreement. GRMD has not raised any other facts or legal issues demonstrating the Exclusion Agreement's authorization of attorneys' fees does not apply.

The Court finds the Exclusion Agreement contains a valid and enforceable provision for the recovery of attorneys' fees and costs and Headwaters is entitled to seek those fees as damages,.

The Court denies GRMD's motion for partial summary judgment.

(II) THE 2016 SERVICE AGREEMENT

The Court denies Headwaters and GR Terra's motion for summary judgment because Headwaters and GR Terra have not demonstrated, as a matter of law, that GRMD breached the GRMD 2016 Service Agreement by pursuing the present lawsuit.

Headwaters and GR Terra (the "Counterclaimants") next move for summary judgment on their respective fourth counterclaims, Breach of GRMD's Service Plan or Improper Modification of Same, which allege GRMD breached or improperly modified the terms of the Second Amendment to Service Plan of GRMD. (Headwaters and GR Terra's Mot., p. 24 and Ex. E) (the Second Amendment to the Service Plan of GRMD is hereinafter referred to as the "GRMD 2016 Service Agreement"). According to the Counterclaimants, GRMD's claims and its positions herein constitute a breach of the GRMD 2016 Service Agreement and were an effort to alter GRMD and Headwaters' obligations thereunder. (Headwaters and GR Terra's Mot., p. 25). The Counterclaimants seek damages, including attorney fees and costs, and injunctive relief. (Count IV Headwaters' counterclaims and Count IV GR Terra's counterclaims).

GRMD contends the GRMD 2016 Service Agreement did not eliminate Headwater's duties imposed by the 2012 LPA and the obligations under the GRMD 2016 Service Agreement and the 2012 LPA are entirely unrelated. (GRMD's resp., p. 21).

The GRMD 2016 Service Agreement amended the 2003 Service Plan and the 2006 First Amendment to the Service Plan. **(**Headwaters and GR Terra's Mot., Ex. E, p. 2). The purpose of the GRMD 2016 Service Agreement was to clarify and to the extent necessary amend both the 2003 and 2006 service agreements and

> to note that the District IGA between GRMD and Headwaters Metropolitan District … will be terminated and replaced with a road maintenance and snow removal agreement, and to clarify that the relationship between GRMD and [Headwaters] as otherwise set forth in the [2003 and 2006 service plans] is terminated and rendered null and void.

(Id.). The parties then amended the 2003 Service Plan to reflect that

- "The District IGA between GRMD and [Headwaters] will be terminated, GRMD will provide all of its own operation and maintenance functions, including debt issuance and repayment, and that GRMD will enter into an agreement with [Headwaters] regarding the funding of road maintenance and snow removal for the roads located within GRMD."
- ". . . [A]ny obligation of GRMD, other than as set forth in the road maintenance and snow removal agreement, to provide funds to [Headwaters], or any delegation of power or delegation of approval or disapproval authority to [Headwaters] of any acts of the District, are repealed and rendered null and void with the intent that any role or relationship of GRMD as a 'Tax District' and [Headwaters] as a 'Service District' is terminated."

(Id. at p. 3).

According to the Counterclaimants, GRMD breached these sections when it "filed the present lawsuit for the express purpose of forcing Headwaters to assume all obligations as tenant under the LPA, to operate and maintain the Amenities on GRMD's behalf, to acquire the Amenities on GRMD's behalf, and to transfer the Amenities to GRMD." (Headwaters and GR Terra's Mot., p. 24). The Counterclaimants contend the GRMD 2016 Service Agreement gives GRMD no right to impose those obligations on Headwaters, that GRMD's efforts to do so were an attempt to alter the GRMD 2016 Service Agreement, and any obligations the districts previously had to one another under their respective service plans, or the Master IGA, had terminated. (Id. at pp. 24-25).

GRMD contends the "Counterclaimants purposefully conflate GRMD's assertion that they are responsible for obligations under the LPA with the fact that the dual-district structure was eliminated" and that "[w]hether the LPA continued in force, whether GRMD was a third-party beneficiary of the LPA, whether Headwaters had continuing obligations under the LPA, simply

has nothing to do with the fact that GRMD would now operate independently from Headwaters." (GRMD's resp., pp. 21-22).

The Counterclaimants have not sufficiently "connected the dots" to demonstrate how the 2012 LPA and GRMD's 2016 Service Agreement are interrelated or how GRMD's 2016 Service Agreement would be altered if Headwaters was forced to own and operate the Amenities under the 2012 LPA, which, perhaps, is why the Court is confused by the Counterclaimants' argument. The GRMD 2016 Service Agreement does not reference the 2012 LPA and the 2012 LPA does not reference any service agreement, much less GRMD as a "Tax District" or Headwaters as a "Service District." It might very well be that the 2012 LPA cannot operate without Headwaters acting as the Service District and GRMD acting as the Taxing District, but the Counterclaimants have not explained why that is the case.

Without more guidance from the parties, which the parties have not provided, the Court is not in a position to grant summary judgment to Headwaters and GR Terra. The Counterclaimants also do not describe or articulate how termination of the dual-district structure would alter Headwater's obligations in relation to the Amenities. It appears to the Court that each district's roles in relation to the other were terminated, but that doesn't necessarily mean each district could not operate independently or that owning and operating the Amenities required a dual-district structure.

Importantly, the Counterclaimants do not cite any section of the GRMD 2016 Service Plan that the Counterclaimants allege GRMD breached. Instead, the Counterclaimants argue that because the GRMD 2016 Service Plan terminated the districts' respective roles to one another, any effort to impose LPA duties on Headwaters was a breach of that service agreement. (Headwaters and GR Terra's Mot., pp. 24-25). Again, the Counterclaimants have not provided any legal authority supporting its theory, which is insufficient for summary judgment purposes.

Lastly, the Counterclaimants have not demonstrated, as a matter of law or fact, that GRMD sought to amend the GRMD 2016 Service Agreement when GRMD filed the present suit. "Upon final approval by the court for the organization of the special district, the facilities, services, and financial arrangements of the special district shall conform so far as practicable to the approved service plan." C.R.S. § 32-1-207(1). Here, GRMD sought to impose additional duties on Headwaters, not on itself. There is no indication GRMD's facilities, services, and financial arrangements would change if it had been successful in its claims; Headwaters only alleges its facilities, services, and financial arrangements would be altered, and Headwaters does not allege a breach of its own service agreement or that GRMD sought to amend its service agreement by adding or decreasing its own services.

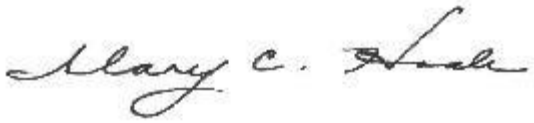
Based on the court's findings above, the Court does not reach the issue of whether the Counterclaimants are entitled to injunctive relief. See C.R.S. § 32-1-207(3)(a).[12]

[12] "Any material departure from the service plan as originally approved or, if the same has been modified, from the service plan as modified, which constitutes a material modification thereof as set forth in subsection (2) of this section, may be enjoined by the court approving the organization of such special district upon its own motion, upon

CONCLUSION

WHEREFORE, the Court hereby **DENIES IN PART** the summary judgment motion of Headwaters Metropolitan District (on Counts I and IV of Headwaters' Counterclaims) and **DENIES** the summary motion of GR Terra LLC (on Count IV of GR Terra's Counterclaims). The Court **GRANTS** summary judgment in favor of Headwaters and against GRMD on Headwaters' claim that GRMD breached Section 6.3 of the Exclusion Agreement. The Court **DENIES** the remainder of Headwaters' summary judgment motion. The Court **DENIES** Granby Ranch Metropolitan District's partial summary judgment motion regarding Headwaters' claim for damages on Headwaters' first counterclaim.

SO ORDERED this 3rd day of March, 2025.



Mary C. Hoak, District Court Judge

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the motion of the board of county commissioners or governing body of a municipality from which a resolution of approval is required by this part 2, or upon the motion of any interested party as defined in section 32-1-204(1)." C.R.S. § 32-1-207(3)(a).

NOTICE OF APPEAL
(C.A.R. 3(d)(8) APPENDIX)

DATE FILED
May 15, 2025 7:11 PM
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CASE NUMBER: 2025CA894

ATTACHMENT #8

DISTRICT COURT, GRAND COUNTY, COLORADO PO Box 192/307 Moffat Avenue Hot Sulphur Springs, CO 80451 970-725-3357	DATE FILED March 28, 2025 11:10 AM 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; and GR TERRA, LLC.	
	▲ **COURT USE ONLY** ▲
	Case No. 2021CV30008 Division 1

ORDER APPROVING THE STIPULATION REGARDING DISMISSAL OF CERTAIN CLAIMS AND PROCESS FOR RESOLUTION OF REMAINING CLAIMS AND ISSUES

This matter having come before the Court on Defendant/Counterclaim Plaintiffs Headwaters Metropolitan District ("Headwaters") and GR Terra, LLC ("GR Terra"), and Plaintiff/Counterclaim Defendant Granby Ranch Metropolitan District ("GRMD") (collectively the "Parties") Stipulation Regarding Dismissal of Certain Claims and Process for Resolution of Remaining Claims and Issues filed on March 27, 2025 ("Stipulation"). This Court hereby approves the Stipulation and orders that:

1. Headwaters' and GR Terra's Counts IV of their respective Counterclaims asserting breach or improper modification of GRMD's Service Plan are dismissed with prejudice.

2. Headwaters' request for injunctive relief in conjunction with its claim for breach of the Exclusion Agreement (Count I of its Counterclaims) is moot in light of the Court's entry of judgment against GRMD on its claims asserted in this litigation and the Court's summary judgment order of March 3, 2025.

3. Headwaters' claim for breach of the Exclusion Agreement (Count I of its Counterclaims) asserted alternative grounds in support of the alleged breach and requested damages. In light of the Court's summary judgment order of March 3, 2025, it is not necessary for the Court to address alternative grounds that are part of the same claim for the same relief.

4. Pursuant to Stipulation, and subject to the terms and reservation of rights therein, this Court will determine Headwaters' claimed damages for Count I (consisting solely of Headwaters' claims for attorneys' fees and costs under the Exclusion Agreement) pursuant to the process for recovery of attorneys' fees and costs in C.R.C.P. 121(c), § 1-22, with written submissions and a right to a hearing if requested by either party.

5. For this purpose, the briefing schedule for recovery of attorneys' fees and costs in C.R.C.P. 121(c), § 1-22 is modified as follows:

a. Headwaters' opening motion and supporting materials will be filed within 45 days of the entry of this Order;

b. GRMD's response in opposition and supporting materials will be filed within 35 days of Headwaters' opening motion;

c. Headwaters' reply brief and any supporting materials will be filed within 21 days of GRMD's response in opposition; and

d. Any party may request a hearing within 14 days of Headwaters' reply brief.

The Cour approves and makes an order of the Court the parties' Stipulation Regarding Dismissal of Certain Claims and Process for Resolution of Remaining Claims and Issues filed on March 27, 2025. If there is a conflict between this order and the parties' Stipulation, the Stipulation will govern.

DATED this 28th day of March, 2025.

BY THE COURT:

Mary C. Hoak

Mary C. Hoak, District Court Judge