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

Plaintiff: GRANBY RANCH METROPOLITAN DISTRICT, a quasi-municipal corporation and political subdivision of the State of Colorado,

v.

Defendants: HEADWATERS METROPOLITAN DISTRICT, a quasi-municipal corporation and political subdivision of the State of Colorado; GRAY JAY VENTURES, LLC.; REDWOOD CAPITAL FINANCE CO., LLC, GRANBY PRENTICE, LLC; and GR TERRA, LLC.

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Case No. 2021CV30008

Division 1

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

Pursuant to C.R.C.P. 12(b)(1) and (5), Defendants Gray Jay Ventures LLC, f/k/a GP Granby Holdings, LLC ("Gray Jay"), Granby Prentice LLC ("Granby Prentice") and GR Terra LLC ("GR Terra") (the foregoing are collectively referred to as the "Private Defendants"), submit this reply in support of their Motion to Dismiss the Second Amended Complaint.

GRMD's response establishes the Private Defendants' right to the requested relief. Instead of citing to allegations in its own Complaint that would entitle GRMD to bring its claims, the Response invents allegations not previously made, misrepresents the documents attached to its Complaint, and asserts novel, unfounded theories to try to manufacture contract obligations that do not exist under contracts that GRMD, in any event, has no right to enforce.

GRMD's Procedural Challenges To the Motion Fail.

GRMD's assertion that the Private Defendants did not distinguish the portions of their motion based upon C.R.C.P. 12(b)(1) or 12(b)(5) is belied by the clear introduction to the motion. The Private Defendants clearly move for dismissal of all the claims asserted against them (Count I, IV, V, VI, VII, & VIII) for lack of subject matter jurisdiction under C.R.C.P 12(b)(1) because GRMD lacks standing to enforce the LPA. In the alternative, the Private Defendants seek dismissal of all these counts for failure to state a claim for relief under C.R.C.P. 12(b)(5). Motion, p. 3.

GRMD asserts that the Private Defendants' challenge to GRMD's status as a third-party beneficiary to the LPA does not raise a jurisdictional issue, citing a case for the proposition that

capacity to sue is not jurisdictional. *See Ashton Properties, Ltd. v. Overton*, 107 P.3d 1014 (Colo App. 2004). But the Private Defendants have challenged GRMD's standing to sue, not its capacity. As stated in the Private Defendants' Motion, lack of standing deprives the court of subject matter jurisdiction under C.R.C.P. 12(b)(1). *Hansen v. Barron's Oilfield Serv.*, 2018 COA 132, ¶ 7. This is so because "[s]tanding is a component of subject matter jurisdiction and is a constitutional prerequisite to maintaining a lawsuit." *Id*. (quoting *Sandstrom v. Solen*, 2016 COA 29, ¶ 14).[1]

GRMD also asserts that this Court cannot determine the jurisdictional issue without an evidentiary hearing. Again, it is wrong. On a 12(b)(1) motion, the Court may consider evidence beyond the pleadings and *may* "hold an evidentiary hearing to resolve any factual dispute upon which the existence of jurisdiction may turn." *Medina v. State*, 35 P.3d 443, 452 (Colo. 2001). However, "if the 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.* In *Medina*, the Supreme Court reversed, in part, only because it found factual disputes on jurisdictional issues that could not be determined on the record before it. *Id*. at 462-63.

Here, all GRMD's claims are based upon the documents provided to this Court with the motion to dismiss briefing. The terms of the operative documents are before the Court, and as GRMD recognized in its briefing, "the interpretation of a written document is a question of law [and] must be enforced by the courts as written." *See* GRMD Response, p. 18 (citing *Shaw v. Sargent School District N. RE-33-J*, 21 P.3d 446, 449 (Colo App. 2001) and *Hudgeons v.*

[1] Indeed, C.R.C.P. 9(a)(1) prescribes just how to raise the capacity of a party to bring suit. But before the Court can reach the issue of capacity, it must first satisfy itself that it has subject matter jurisdiction to even hear the case. And that is where GRMD's claims fail.

Tenneco Oil Co., 796 P.2d 21 (Colo. App. 1990)). An evidentiary hearing on the Private Defendants' Motion would consist of the parties submitting these same documents to the Court and arguing their interpretations of those documents – exactly what they have already done. GRMD has not identified any specific factual dispute that cannot be resolved on the record before this Court or any additional evidence it would present to the court at an evidentiary hearing. Under such circumstances, an evidentiary hearing is unnecessary because this jurisdictional issue can and should be resolved as a matter of law.

I. GRMD Has Not Established It was a Direct Third-Party Beneficiary of the LPA.

GRMD does not dispute that a non-party lacks standing to enforce a contract unless the non-party can establish that it is a direct and intended third-party beneficiary of the contract. *See Bear Creek Dev. Corp. v. Genesee Found.*, 919 P.2d 948, 952 (Colo. App. 1996) ("incidental third-party beneficiary to the option contract . . . lacks standing to exercise the option"); *Frisone v. Deane Auto. Ctr.*, 942 P.2d 1215, 1217 (Colo. App. 1996) (affirming dismissal of breach of contract claim for lack of standing). Since standing is jurisdictional, the question before this Court is not (as GRMD asserts) whether GRMD has pleaded a "plausible" claim to third-party beneficiary status. Rather, GRMD has the burden to produce facts to establish that it was an intended, direct third-party beneficiary of the LPA. It has not done so.[2]

GRMD agrees that contracting parties' intent to confer a benefit on a third party "must appear from the contract itself or be shown by necessary implication." Response, p. 8 (*citing E.*

[2] GRMD's Response to Statement of Facts and arguments contain numerous factual statements that are devoid of any citation to the specific allegations of the complaint or exhibits attached thereto. GRMD cannot expect this Court to scour the voluminous record before it for the cited allegations or relevant provisions of the documents. This omission by GRMD alone warrants the requested relief.

Meadows Co., LLC v. Greeley Irr. Co., 66 P.3d 214, 217 (Colo. App. 2003)). It has not proven that the terms of the LPA or the surrounding circumstances establish in clear terms or by necessary implication that the owner of the Amenities at the time (GRH) and Headwaters intended to confer a direct benefit on GRMD when they entered the LPA.

A. The LPA does not make GRMD a direct third-party beneficiary.

GRMD's third-party beneficiary claim is primarily based upon a single reference to GRMD in a recital to the LPA. That recital merely acknowledges that GRMD and Headwaters adopted the 2005 Fee Resolution (which GRH was not a party to)[3] and that Headwaters entered the 2005 Fee Agreement with GRH, and pursuant to that resolution and agreement (as well as another agreement with a different property owner), "Tenant [Headwaters] imposes Amenity Fees . . .on property within Granby Ranch development ("Granby Ranch") for use of the Leased Premises." Ex. 6, Recital B. As is the nature of a recital, this statement simply provides background for the lease obligations that follow, which involve Headwaters' use of the amenity fees to pay the rent. The recital is not made a part of the terms of the LPA, and it does not create any duty by Headwaters or GRH to perform any obligation for GRMD's direct benefit.

The mere fact that the LPA authorizes Headwaters to use the amenity fee for rent does not lead to the necessary conclusion that the parties intended to confer a direct benefit on GRMD. As set forth in the Private Defendants' motion, the terms of that contract demonstrate no intent to allow GRMD to force Headwaters to purchase the Amenities or to allow GRMD to sue GRH for return of rental paid. To the contrary, the LPA left the decision to purchase prior to

[3] All defined terms shall have the meaning set forth in the Private Defendants' Motion to Dismiss, unless otherwise stated herein.

the end of the 50-year term solely up to Headwaters. Ex. 6, §§ 2, 23. And Headwaters was only required to purchase at the end of the term *if* the LPA had not been otherwise terminated at that time. Ex. 6, § 23 (c). Headwaters had the option to terminate the agreement at any time by choosing not to approve the rent payment to GRH. Ex. 6, §§ 2(a), 3(a), 3(c). Upon termination, Headwaters had no right to recoup rent previously paid thereunder. Ex. 6, §§ 2(a), 3(a), 3(c).

GRMD tries to argue that it is "irrelevant" that the LPA bars Headwaters' right to recover the rent payments and that this does not bar GRMD's remedies. Response, p. 12. GRMD misses the point; this language is relevant to establish that the parties to the LPA – Headwaters and GRH – did not intend to treat the rent paid as equity toward the purchase price in the event the lease terminated before the end of the term. Ex. 6, § 3(a).

Despite the Response's attempt to assert a new, unpled damages theory, the return of rental payments as equity is precisely the remedy the complaint seeks. *See* Sec. Amend, Compl. ¶ 52(i) (seeking "damages … which will allow GRMD to recover any equity *paid* into the LPA by GRMD since 2006") (emphasis added); ¶¶ 56(i), 60(i), 66(i), 72(i), 78(i), 86(i) (same). Headwaters' option, in its sole discretion, to terminate the LPA prior to acquiring the Amenities without return of the rental or recourse to recover damages for amounts paid defeats GRMD's argument that it has a right to enforce the LPA to recover "equity" in the form of rental paid. If the parties did not give that right to Headwaters, they certainly did not intend to give it to GRMD – a stranger to the contract.

B. <u>The surrounding circumstances do not establish that the parties to the LPA intended to make GRMD a direct third-party beneficiary</u>.

Unable to prove third-party beneficiary status based upon the LPA, GRMD turns to the "surrounding circumstances." In particular, it asserts that the 2005 Fee Resolution creates an

"inference" that the parties intended to confer a direct benefit on GRMD through the rental and acquisition of the Amenities. Response, p. 10. An inference does not prove, *by necessary implication*, the contracting parties' intent. For that reason alone, GRMD's argument fails.

In any event, the language of the 2005 Fee Resolution defeats GRMD's claim. The Resolution recites that "the Districts," Headwaters and GRMD, "have determined that it is in the best interest of the Districts to acquire, lease, finance, construct, maintain, provide, operate ***and/or*** administer certain recreational amenities benefiting the property within the Districts, . . . " Response, p. 17 (quoting Ex. 4, Recital 2) (emphasis added). This language only says the Amenities *themselves* will benefit the property within the Districts; it does not say that *Headwaters' use of the amenity fee to rent or acquire the property* is intended to specifically benefit GRMD. Nor does it require the amenity fees to be used solely to lease or acquire the amenities – the disjunctive makes clear that the fees could also be used to construct, maintain, operate ***or*** administer the Amenities. This is consistent with section 4 of that document, stating that the amenity fees shall be paid "to Headwaters" to be used "for the purpose of financing the acquisition, leasing, construction, and replacement of Amenities," including the issuance of bonds. Ex. 4, §§ 6, 10.

Moreover, the 2005 Fee Resolution cannot prove the intent of the parties to the LPA because only Headwaters, and not GRH, was a party to the Resolution. For that reason, the Resolution specifically states that "Headwaters will impose and collect the Amenity Fee as set forth in the Amenity Fee Agreements . . . between Headwaters and Granby Ranch Holdings, LLC [GRH] or Aspen Meadows Condominiums, LLC, *which are incorporated herein by this reference*." Ex. 4, 7th Recital. Thus, the 2005 Fee Resolution must be construed in conjunction

with the 2005 Fee Agreement. As the parties recognized, it is the Fee Agreement, not the Fee Resolution, that governs the imposition and use of the Amenity Fee because the property owner, GRH, was not a party to the Resolution. Only the property owner could agree to subject its property to the amenity fee, and it did that in the 2005 Fee Agreement.

The 2005 Fee Agreement provides that the "intended purpose of the Amenity Fee is to entitle certain minimum use and enjoyment of the Amenities *to the owners and purchasers of homes and homesites within the Property, and certain persons not resident within the Property*." Ex. 9, Recital E (emphasis added). The "Property" subject to the Fee Agreement was not all located within the boundaries of GRMD; the amenity fee was imposed on other property as well. Exs. 1 & 2, Ex. 9, Schedule 1. In fact, following GRMD's action in December of 2005 to exclude significant portions of the property previously included in its boundaries, only 813 of the approximately 4,937 acres subject to the amenity fee under the Fee Agreement were located within GRMD. Ex. 9, Schedule 1 and Ex. 12.

In addition, the 2005 Fee Agreement specifically provides that "[n]othing herein obligates the Developer to convey, lease, or otherwise contract for any specific Amenities." Ex. 9, Recital C. Thus, GRH – the owner of the Amenities – expressly disclaimed any obligation to convey any specific amenities to Headwaters or any other District. It simply left open the option that GRH might chose to do so, which it did when GRH granted Headwaters a lease and option to purchase the Amenities described therein under the terms of that agreement.

Finally, GRMD's Response wholly ignores the critical fact that the parties amended the 2005 Fee Agreement in 2013 and the amended Agreement specifically disclaims any intent to

benefit third parties other than Granby Ranch Metropolitan Districts 3-7, which are separate and distinct districts from GRMD. *See* Ex. 10, § 21(d).

As GRMD's introduction makes clear, its Response is premised on the unsupported conclusion that Headwaters committed to the Town of Granby and other Granby Ranch Districts that it would acquire the Amenities and operate them for the residents in the Districts. But the Granby IGA, like the 2005 Fee Agreement, acknowledged that the Amenities are not required to be dedicated or conveyed by the Developer for public use. Am. Compl., Ex. 5, ¶ 5(b) – (d). Moreover, GRH – the owner of the Amenities – was not a party to the Granby IGA and thus it could not create any enforceable rights in Headwaters, or any other District, to acquire the Amenities. GRMD has no response to that indisputable conclusion.

These "surrounding circumstances," even if relevant to determine the intent of the parties to the LPA, flatly defeat GRMD's claim that Headwaters and GRH intended to directly benefit GRMD when they entered the LPA. At most, these documents evidence a broad concept for Headwaters to collect amenity fees to defray the costs of acquisition, construction, and installation of the amenities to be developed at Granby Ranch and for the property owners subject to those fees, in return, to obtain priority access and discounts to the amenities. GRMD does not dispute that the residents within its boundaries have received those benefits.

While the documents contemplated that one or more of the metropolitan districts might eventually acquire the Amenities, they created no enforceable rights in any such District to do so. Nor do they obligate Headwaters to acquire the Amenities on GRMD's behalf or entitle GRMD to return of the Amenity Fees paid. To the contrary, the 2016 Termination Agreement

acknowledges the intent of Headwaters and GRMD that those entities would thereafter "operate independently from" each other. Ex. 8, Recitals F & G.

GRMD asserts that upon Headwaters' dissolution, GRMD would accept responsibility for the operation and maintenance of any infrastructure located with GRMD. Response, p. 11. GRMD cites paragraph 16 of the Second Amended Complaint for this proposition, which in turn refers only to the 2005 Fee Resolution. Neither paragraph 16 nor the 2005 Fee Resolution contain any reference to GRMD's assumption of these duties. In fact, while GRMD's assumption of these responsibilities is referenced in the Master IGA, *see* Ex. 1 & 2 and MGA IGA attached thereto, § 5.4, the Master IGA has been terminated. Ex. 8. So GRMD's allegation is contradicted by the plain terms of the documents it relies on and is not entitled to the presumption of truth.

GRMD has cited no facts or law to support its claimed third-party beneficiary status. GRMD's reliance on *E.B. Roberts Const. Co. v. Concrete Constructors, Inc*., 704 P.2d 859 (Colo. 1985) is misplaced. In that case, Roberts, a general contractor, entered a contract with CCI to perform certain work as subcontractor. The contract required CCI to furnish a performance bond. When CCI could not obtain the bond, Roberts, CCI and Ideal entered a contract amendment that substituted CCI as the subcontractor. *Id*. at 861. The court determined that CCI was a direct third-party beneficiary of the contract between Ideal and Roberts[4] because all parties understood that Ideal would secure the performance bond but that CCI would perform the work and receive the compensation under the contract, an understanding confirmed by the

[4] The court's factual recitation indicates that CCI was actually a party to the amended contract. *Id*. at 861.

parties' course of performance and the progress payments made to CCI. *Id*. at 865-66. The benefit to CCI was direct, because "the sole purpose" of the amendment was to enable CCI to go forward with the work. *Id*. at 866.

The facts before this Court are very different. GRMD has not even tried to argue that the sole purpose of the LPA was to provide a benefit to GRMD. Nor has GRMD cited any facts to establish that the parties intended to confer a direct benefit on GRMD when they entered the LPA. GRMD lacks standing to sue to enforce the LPA, and for that reason Count I, IV, V, VI, VII, and VIII should be dismissed for lack of subject matter jurisdiction.

II. GRMD Fails to State a Claim for Breach of the LPA Against Gray Jay (Count I), Granby Prentice (Count IV) or GR Terra (Count V).

Even if GRMD had standing, it has not asserted claims for breach of the LPA against Gray Jay, Granby Prentice or GR Terra. GRMD claims that each of these defendants breached the LPA by refusing to act as landlord and refusing to accept the purchase price provisions of that agreement.

As set forth in the Private Defendants' Motion, these claims all fail because GRMD has not pleaded satisfaction of a condition precedent – delivery of the referenced nondisturbance and attornment agreement required for its claim. GRMD's Response concedes as much. Its only attempt to overcome this hurdle is a reference to language from the LPA reciting that the Landlord "*shall* cause to be delivered to Tenant a Subordination, Non-Disturbance and Attornment Agreement *to be executed* by Redwood Capital Finance Company ("Lender"). Response, p. 13 (citing Exhibit 6, §13(b)). This obviously contemplates action to be taken in the future; it does not establish that such a document was ever delivered to the Tenant.

GRMD also recites a sentence from the LPA stating that "landlord has delivered to Tenant, an agreement executed by Lender *either* subordinating this Lease to the deed of trust held by Lender but obligating the Lender and any successor thereto to be bound by this Lease and all Tenant's rights hereunder . . . ." *Id*. (emphasis added). The sentence is indecipherable. It is unclear what Tenant is acknowledging or whether the Lender ever agreed and delivered any document whereby it would be bound to the terms of the Lease in the event of a foreclosure.

Moreover, GRMD does not cite to any attornment and nondisturbance agreement properly recorded in the land records as necessary to bind successive holders of the deed of trust. CRS § 38-35-108 provides that where a recorded instrument affecting title to real property (here the LPA) contains a reference to another instrument purporting to affect title to said real property, that reference binds "only the parties to the [recorded] instrument and shall not be notice to any other person whatsoever." Unless the referenced instrument is recorded, "no person other than the parties to the [recorded] instrument shall be required to make any inquiry or investigation concerning such recitation or reference." *Id. See also Gilpin Inv. Co. v. Blake*, 712 P.2d 1051, 1054 (Colo. App. 1985).

Therefore, even if the original lender provided the original tenant a nondisturbance agreement, because GRMD does not even try to allege that any such agreement was ever recorded in the land records, the original lender's successors were not bound by any such document. As a matter of law, the foreclosure eliminated the LPA as set forth below.[5]

[5] Granby Prentice also moved to dismiss Count IV because, based upon the allegations in GRMD's pleading, Granby Prentice never took title to the property. GRMD now tries to amend its pleadings through its Response to argue that "assuming" a certain duration of the redemption period, Granby Prentice had title for 5 days. GRMD cannot assume facts contrary to those in its pleadings. Moreover, even if Granby Prentice had technically held title for 5 days, there are no facts to support

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

Count VI appears to assert that Gray Jay tried to prevent Headwaters from operating the Amenities and tortiously interfered with LPA, causing GRMD to suffer damages as a third-party beneficiary of that agreement. *Id*. at ¶¶ 75-77. The Private Defendants' motion establishes that even if GRMD had standing, it has not alleged any facts supporting a claim for tortious interference against Gray Jay or Granby Prentice because under black letter Colorado law, "a defendant cannot be liable for interference with its own contract." *MDM Grp. Assocs. v. CX Reinsurance Co. Ltd.*, 165 P.3d 882, 886 (Colo. App. 2007) (holding a plaintiff "cannot maintain an action against [defendant] for tortious interference with *any* contract to which [defendant] is a party"). Instead, a claim for tortious interference must allege that a defendant, who is "*not a party to the contract*, induces the third party to breach the contract, or interferes with the third party's performance of the contract." *Colo. Nat'l Bank*, 846 P.2d at 170 (emphasis added). "[I]t is the conduct of the third person *who is not a party to the contract* that is punished for inducing a breach or preventing performance of the contract." *Id.*

Again, GRMD has no plausible response. It makes the contorted argument that these defendants were not parties to the LPA when it was entered. But GRMD's entire claim is premised upon conduct that these parties allegedly undertook in their roles as Landlord, *after they allegedly acquired title to the property*. So, under GRMD's own theory, the alleged unlawful conduct that led to alleged breach of the LPA occurred when those defendants were allegedly parties to the LPA. The tenant could not sue the landlord for tortious interference with

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a claim that GRMD ever made demand that Granby Prentice recognize the LPA or act as Landlord thereunder during that 5-day period.

its own contract; neither can GRMD even if a third-party beneficiary.

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

GRMD recognizes that the purpose of the good faith and fair dealing doctrine is to ensure that both parties' *reasonable expectations* that they will benefit from the contract are not frustrated by the actions of one party. Colorado courts will not imply a duty of good faith and fair dealing that contradicts the terms or conditions for which a party has bargained. *McDonald v. Zions First Nat'l Bank, N.A.*, 348 P.3d 957, 967 (Colo. App. 2015). "Nor does the duty ... inject substantive terms into the parties' contract." *Id*. (internal quotations omitted).

As a case cited by GRMD confirms, a third-party beneficiary's rights are no greater than those of the parties to the contract itself. *See Bloom v. National Collegiate Athletic Assn*., 93 P.3d 621, 625 (Colo. App. 2004). Thus, GRMD can only succeed on its claim if Headwaters could have sued Gray Jay under the LPA for the acts giving rise to the alleged breach. It could not.

GRMD alleges that Gray Jay failed to "uphold its duty of good faith and fair dealing when it refused to act as Landlord under the LPA and honor the right of Headwaters to acquire the Leased Premises on behalf of GRMD." Am. Compl. ¶ 84. Here, GRMD's claim is premised on legal conclusions that, as described above in relation to the breach of contract claims, are not supported by the plain language of the LPA or any other agreement attached to the Amended Complaint. GRMD has not alleged that Gray Jay acted in any specific manner (let alone dishonestly or outside of accepted commercial practices) to thwart or otherwise undermine any attempt by Headwaters to purchase the property under the LPA.

There is no dispute that the LPA only granted Headwaters an option to purchase the Leases Premises during the term of the lease, which ran until 2062. The Amended Complaint fails to plead that Headwaters ever tried to exercise that option. The duty of good faith cannot impose an obligation on the successor landlords to accept a purchase price that has never been offered or to convey title to a party that has not requested it. Such an obligation would contravene the plain terms of the LPA and impose obligations that do not exist in the agreement.

VI. GRMD Has Not Stated a Claim for Declaratory Relief.

The Private Defendants' Motion proved that, even if GRMD had standing to enforce the LPA, its request for this Court to declare that the LPA was not terminated fails as a matter of law. Even assuming the truth of the pleaded facts and assuming GRMD's allegation that the LPA was an installment land contract (which these defendants dispute), Colorado statutes expressly confirm that a non-judicial foreclosure of a senior deed of trust extinguishes parties' interests in junior land contracts. Specifically, the non-judicial foreclosure statute provides that "an installment land contract vendee of property"—i.e. a buyer—"shall be considered an owner . . . and such vendee shall be subject to all requirements in this article with respect to owners." C.R.S. § 38-38-305(3). *See also Paraguay Place-View Trust v. Gray*, 981 P.2d 681, 683 (Colo. App. 1999).

Because the Deed of Trust was senior to the LPA, Headwaters was, at best, a vendee under the LPA, C.R.S. § 38-38-305(3). Headwaters did not exercise a statutory right to redeem, and the LPA was eliminated by the non-judicial foreclosure undertaken by Granby Prentice. As a matter of law, conveyance of the Leased Premises to Gray Jay through the non-judicial foreclosure proceedings extinguished the LPA, and Count VIII must be dismissed with prejudice.

The only new argument asserted by GRMD is that the agreements in the LPA were covenants that ran with the land. Response, p. 14. But even assuming that is true, GRMD cites no cases for the proposition that covenants that run with the land survive foreclosure of a senior deed of trust. C.R.S. § 38-38-501 provides that, subject to rights to cure and redeem, title vests in the certificate of purchase "free and clear of all liens and encumbrances junior to the lien foreclosed." The statute makes no exception for covenants that run with the land.

The 1893 decision in *Fisk v. Cathcart*, 3 Colo. App. 374, 33 P. 1004 (1893), does not support GRMD's argument. That decision does not deal with a foreclosure conducted under the Colorado foreclosure law (and certainly not those in effect in 2020). And the holding is based upon a scenario where the purchaser takes title subject to an encumbrance. Here, the foreclosure eliminated the LPA and subsequent purchasers did not take subject to that interest.

CONCLUSION

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

Dated: August 13, 2021

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CERTIFICATE OF SERVICE

I hereby certify that on the 13th day of August, 2021 a true and correct copy of the foregoing **DEFENDANTS GRAY JAY VENTURES LLC, F/K/A GP GRANBY HOLDINGS, LLC, GRANBY PRENTICE LLC, AND GR TERRA LLC'S REPLY IN SUPPORT OF THEIR MOTION TO DISMISS SECOND AMENDED COMPLAINT** was served upon the following via the Colorado Courts e-filing system:

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