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DISTRICT COURT, GRAND COUNTY, COLORADO

P.O. Box 192
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

REPLY IN SUPPORT OF MOTION TO DISMISS OF REDWOOD CAPITAL FINANCE CO., LLC, BY GRANBY PRENTICE, LLC, ITS SUCCESSOR BY CONTRACT AND INDEMNITOR

Defendant Granby Prentice, LLC ("Granby Prentice"), as successor by contract and indemnitor to Redwood Capital Finance Co., LLC ("Redwood"), hereby submits this reply brief on behalf of Redwood in support of the Motion to Dismiss Plaintiff Granby Ranch Metropolitan District's ("GRMD") Second Amended Complaint as to Redwood.

ARGUMENT

For many reasons articulated in the briefing by Private Defendants and Headwaters, GRMD's long-shot effort to enforce an agreement to which it was never a party is fatally defective, not least of which because GRMD has no standing to assert its claims. But even putting aside those numerous defects, GRMD's attempt to include Redwood as a defendant is particularly groundless. GRMD's claims are premised entirely on (lawful) conduct occurring in the period around the 2020 foreclosure of Granby Ranch and its subsequent sale to new owners. Yet, according to GRMD's own complaint, Redwood by that time was a cancelled and dissolved entity with no interests at all in Granby Ranch. Indeed, GRMD's complaint makes clear that although Redwood previously held a deed of trust, it never took title to the property and had transferred its interests long before the foreclosure and related events, and therefore had never succeeded to being a party to the LPA even under GRMD's incorrect interpretation of that agreement.

Unable to escape this conclusion, GRMD in its response brief unfortunately resorts to repeating a clear misstatement of fact that it was Redwood (and not Granby Prentice) that "initiat[ed] foreclosure on the property… [and] assigned its interest in the certificate of purchase," and only then "purport[ed] to have cancelled itself." Response Br. at 2; *see also id.* at 12 ("Redwood succeeded to the interest of the Landlord [after foreclosure]" and then "purported to assign its rights under the certificate of purchase to a related entity"). Perhaps these misstatements can be chalked up to a case of confusion regarding the various entities GRMD chose to name as defendants. But such misstatements and confusion cannot overcome the contradicting (and more accurate) allegations in GRMD's own complaint, which establish that Redwood had exited the picture at Granby Ranch long before the foreclosure and indeed was no longer a legally viable

entity by the time the events about which GRMD complains occurred. Because GRMD's own allegations make no connection between Redwood and any of the supposedly unlawful conduct that it alleges, GRMD's claims against Redwood fail.

But the Court need not even address the merits of GRMD's claims—both because GRMD has no standing (as explained in Private Defendants' and Headwaters' briefing), and also because GRMD fails to demonstrate how it can sue or serve a Delaware LLC that has been lawfully dissolved and cancelled under Delaware law. Accordingly, the Court should summarily dismiss GRMD's complaint as to Redwood.

I. C.R.C.P. 12(b)(4): GRMD's Complaint Must Be Dismissed for Insufficient Service of Process.

GRMD's attempt to explain how it could lawfully serve and sue an entity that no longer exists fails. GRMD does not dispute that, after a certificate of cancellation is issued, a dissolved Delaware LLC cannot be served with process nor be sued. *See, e.g.*, *Metro Commc'n Corp. BVI v. Advanced Mobilecomm Tech.*, 854 A.2d 121, 138-39 (Del. Ch. 2004). Instead, GRMD asks this court to "revive[]" the cancelled LLC to allow it to be sued in this case.

The first problem with GRMD's request is that it would circumvent Delaware's established process for a dissolved LLC to participate in lawsuits. Delaware statute provides that, for a cancelled LLC to "prosecute and defend" lawsuits, it is necessary to petition the Court of Chancery to appoint, upon the showing of good cause, a trustee or receiver to undertake actions "that may be necessary for the final settlement of the unfinished business of the [LLC]." 6 Del. Code tit. 6 § 18-805. GRMD has clearly not made such a petition, and this Court has no authority to make any such appointment for a cancelled Delaware LLC.

Implicitly recognizing this failure, GRMD tries a different tact and asks this court to "nullify" Redwood's certificate of cancellation. Although some courts have nullified a LLC's certificate of cancellation, they have done so only in response to a specifically pleaded request supported by facts alleged in the complaint demonstrating that the cancellation was issued in contravention of Delaware law. *See Metro Commc'n Corp.*, 854 A.2d at 139 (requiring that "the complaint plead[] facts that support the inference that [the LLC] was wound up in contravention of the LLC Act"); *Schiff v. ZM Equity Partners, LLC*, No. 19cv4735, 2020 U.S. Dist. LEXIS 155916, at *8 (S.D.N.Y. Aug. 27, 2020) (rejecting nullification request because "the Amended Complaint is devoid of any factual allegations" supporting nullification); *Anthony Wayne Corp. v. Elco Fastening Sys.*, LLC, No. 3:13CV1406-PPS, 2016 U.S. Dist. LEXIS 20243, at *6 (N.D. Ind. Feb. 19, 2016) (considering and rejecting specific claim in the complaint seeking nullification of a Delaware LLC's certificate of cancellation). This is true even in the single case GRMD relies on. *See Capone v. LDH Mgmt. Holdings LLC*, No. CV 11687-VCG, 2018 WL 1956282 at *16 (Del. Ch. Apr. 25, 2018) ("Count I of the Complaint seeks an order nullifying the cancellations of [defendant LLCs]").

In contrast to the plaintiffs in those cases, GRMD did not ask for nullification in its complaint nor make specific factual allegations in the complaint to support nullification—indeed, the Second Amended Complaint says nothing at all about the validity of Redwood's cancellation other than acknowledging that Redwood was indeed "cancelled" according to public records. Second Am. Compl. ¶ 4. GRMD's claims against Redwood must be dismissed for this reason alone.

Even if the Court were to consider GRMD's arguments in its Response brief as a replacement for factual allegations, *but see Fischer v. Minneapolis Pub. Schs.,* 792 F.3d 985, 990 n.4 (8th Cir. 2015) ("[I]t is axiomatic that [a] complaint may not be amended by the briefs in opposition to a motion to dismiss."), GRMD's arguments fall far short of what is required to nullify a LLC's cancellation. GRMD observes that Delaware law requires a dissolving LLC to make provision for "claims *known* to the [LLC]." Resp. Br. at 5 (citing Del. Code tit. 6 § 18-804(b)(1), emphasis added). The case GRMD relies on—*Capone*—makes clear that a LLC's knowledge of claims must be "actual" rather than "constructive." *Capone*, 2018 WL 1956282 at *25-26. Yet GRMD nowhere even argues, much less provides specific fact allegations to support, that Redwood—when it filed a certificate of cancellation in 2018—had *actual* knowledge that GRMD would years later seek to sue Redwood based on alleged breaches of an agreement to which neither GRMD nor Redwood was ever a party. The most GRMD musters is the unexplained accusation that Redwood "should have been aware" of a potential later claim by "a third-party beneficiary" to the LPA. Response Br. at 6. This argument fails because it falls short of establishing Redwood's actual knowledge of claims at the time of cancellation. It also fails because it is preposterous to assert that Redwood, in filing a certificate of cancellation in December 2018 after having sold all of its interest in the Granby Ranch loan and deed of trust in April 2016, could possibly anticipate that years later, following the subsequent foreclosure of Granby Ranch by another entity (Granby Prentice), GRMD would sue Redwood claiming liability on a contract to which GRMD was never a party and which had not yet been affected by that subsequent foreclosure. GRMD cannot circumvent the lawful reality of Redwood's cancellation through such strained and incredulous suppositions that are devoid of any fact allegations.

Because Redwood is a cancelled LLC, and because GRMD has failed to plead for nullification or prove that nullification is merited, Redwood cannot be sued or served and must be dismissed from this case.

II. C.R.C.P. 12(b)(1): The Court Lacks Subject Matter Jurisdiction Over GRMD's Claims Against Redwood.

Because it is neither a party nor an intended third-party beneficiary to the LPA, GRMD has failed to establish its standing to assert a breach of or tortious interference with the LPA against Redwood. GRMD's arguments in response simply repeat the arguments it made in response to the Private Defendants' Motion to Dismiss. Redwood joins in and incorporates by reference Section I of the Private Defendants' Reply in support of their Motion to Dismiss.

III. C.R.C.P. 12(b)(5): GRMD Fails to State a Breach of Contract Claim Against Redwood.

The Motion to Dismiss on behalf of Redwood demonstrates that GRMD's breach of contract claim against Redwood fails because (1) GRMD does not allege (and cannot plausibly allege) that Redwood was ever a party to or bound by the LPA, and (2) GRMD does not allege (and cannot plausibly allege) that Redwood took any action whatsoever post-foreclosure of Granby Ranch, much less any action that could constitute a breach of the LPA. *See* Mot. to Dismiss at 10-11. GRMD's arguments in response fail entirely to address or cure these fatal defects.

GRMD points to Section 13(b) of the LPA to assert that Redwood had agreed to be bound by the LPA while also subordinating the LPA to the deed of trust. Even if Redwood had entered into such an agreement, GRMD ignores the language in Section 13(b) stating that such an obligation only existed "to the extent [Redwood] should succeed to the interest of Landlord and/or acquire title or right of possession of the Leased Premises." *See* Response Br. 11 (quoting LPA

Sec. 13(b)). GRMD then makes the conclusory and false statement—contradicted by GRMD's own complaint—that "Redwood succeeded to the interest of the Landlord (GRH) when GRH foreclosed on the property." *Id.* at 12. In its Second Amended Complaint, GRMD alleges that "[f]ollowing the foreclosure, Gray Jay Ventures"—and not Redwood—"became successor in interest to the LPA and was bound to assume the role of Landlord under the LPA." Second Am. Compl. ¶ 36. Redwood could not have become the successor in interest because its interest in the deed of trust was transferred to Granby Prentice well before the foreclosure, and it was Granby Prentice that initiated foreclosure and subsequently assigned the certificate of purchase issued by the Public Trustee to Gray Jay Ventures, which took title to Granby Ranch. *Id.* ¶¶ 33-36.

In short, GRMD acknowledges that Redwood could only be bound by the LPA "if it acquired title to" Granby Ranch, *id.* ¶ 59, and GRMD's own allegations also establish that Redwood never acquired title to the property because it had exited the picture long before the foreclosure and issuance of the certificate of purchase, *id.* ¶¶ 33-36. As such, even under GRMD's allegations, Redwood could never have been bound by the LPA. GRMD's effort in its Response Brief to contort and obscure the chain of events to suggest Redwood had anything to do with foreclosure and post-foreclosure activities is defeated by GRMD's own complaint.

For the same reason, GRMD has failed to allege any conduct by Redwood that could constitute a breach of the LPA. Although GRMD falsely (hopefully mistakenly) states in its Response Brief that Redwood "purported to assign its rights under the certificate of purchase to [Granby Prentice] in the expressed hope that this would extinguish its own obligations under the LPA," Response Br. at 12, GRMD's complaint asserts (more accurately) that Redwood had assigned its rights under the deed of trust long before the foreclosure, and it was Granby Prentice

that obtained and assigned the certificate of purchase. Second Am. Compl. ¶¶ 33-36. Thus, GRMD's complaint has nothing to say (and could not have anything to say) about any action or inaction by Redwood during or following the foreclosure that could possibly constitute a breach of the LPA. Accordingly, the breach of contract claim against Redwood must be dismissed.

IV. C.R.C.P. 12(b)(5): GRMD Fails to State a Claim for Tortious Inference Against Redwood.

GRMD makes the same mistake and misstatement in its argument concerning its tortious interference claim. GRMD baldly states that "[a]s a successor in interest to the LPA, Redwood was fully aware of its obligations to Headwaters (and GRMD) under the LPA." Response Br. at 13. Apart from having nothing to do with the elements of a tortious interference claim, this statement is contradicted by GRMD's own complaint, which demonstrates Redwood was never a successor in interest to the LPA and never took title to the property because Redwood had transferred its interests in the deed of trust long before the foreclosure. Second Am. Compl. ¶¶ 33-36. Moreover, GRMD utterly fails to identify any conduct at all taken by Redwood that could constitute tortious interference. Nor could it, given that Redwood was a cancelled and dissolved entity by the time any of the conduct that GRMD complains about with respect to the LPA occurred. As such, GRMD's tortious interference claim against Redwood must be dismissed.[1]

[1] The claim fails for the additional reason articulated by Private Defendants in their briefing—Redwood cannot be liable for tortious interference with its own contract. *See* Private Defs.' Reply Brief, Section III. Under GRMD's flawed theory, Redwood was somehow at some point a party to the LPA and bound by its obligations. *See* Second Am. Compl. ¶¶ 59-60. If that were true, GRMD cannot pursue tortious interference liability against Redwood for the reasons articulated by the Private Defendants, which is incorporated by reference herein.

CONCLUSION

GRMD's complaint against Redwood must be dismissed because GRMD fails to demonstrate how it could lawfully sue or serve Redwood as a cancelled Delaware LLC. Additionally, the Court lacks subject matter jurisdiction as to GRMD's claims because GRMD is not a third party beneficiary to the LPA and, even if the Court had jurisdiction, GRMD fails to state any claim against Redwood.

Dated: August 13, 2021

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ATTORNEYS FOR DEFENDANT GRANBY PRENTICE, LLC, AS SUCCESSOR AND INDEMNITOR TO REDWOOD CAPITAL FINANCE CO., LLC

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing **REPLY IN SUPPORT OF MOTION TO DISMISS OF REDWOOD CAPITAL FINANCE CO., LLC, BY GRANBY PRENTICE, LLC, ITS SUCCESSOR BY CONTRACT AND INDEMNITOR** was served via **Colorado Court E-File** system on this 13th day of August 2021, addressed to the following:

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