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 11:28 AM 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