DISTRICT COURT, GRAND COUNTY, COLORADO P.O. Box 192/307 Moffat Avenue Hot Sulphur Springs, CO 80451 970-725-3357	DATE FILED: January 28, 2022 11:26 AM CASE NUMBER: 2021CV30008
Plaintiff: GRANBY RANCH METROPOLITAN DISTRICT, a quasi-municipal corporation and political subdivision of the State of Colorado, v. **Defendants:** HEADWATERS METROPOLITAN DISTRICT, a quasi-municipal corporation and political subdivision of the State of Colorado; GRAY JAY VENTURES, LLC.; REDWOOD CAPITAL FINANCE CO., LLC, GRANBY PRENTICE, LLC; and GR TERRA, LLC.	
	▲ **COURT USE ONLY** ▲
	Case No. 2021CV30008 Division: 1

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

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

FACTS

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

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

1. Formation of the Districts.

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

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

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

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

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

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

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

2. The 2005 Joint Fee Resolution.

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

3. The 2005 Amenity Fee Agreement.

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

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

4. The 2008 Granby Intergovernmental Agreement.

The 2008 Granby IGA superseded and replaced the 2003 Granby IGA. The 2008 Granby IGA provided for the Districts and the GRMD Nos. 2-8 "to acquire, construct, own, operate and maintain the ski area and lifts, ski lodge, golf courses and appurtenant clubhouse and maintenance facilities, which included a Fishing Camp on the Fraser River, the 18-hole Headwaters Golf Course, and the Sol Vista Ski Basin. Exhibit A to the 2008 Granby IGA more thoroughly describes these amenities." (Sec. Amend. Compl., Ex. 5.) The 2008 Granby IGA recognized the Priority Access given to owners within Granby Ranch, but also stated that

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

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

5. The Leased Premises Agreement.

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

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

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

6. The 2013 Amended and Restated Joint Resolution.

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

7. The 2013 Amenity Fee Agreement.

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

8. The 2016 Granby IGA.

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

[10] The parties have not provided the Court with the original lease agreement or any of the amendments thereto.
[11] The 2013 Fee Agreement affirmed the one-time amenity fee to be collected by Headwaters and affirmed the rights of eligible property owners to priority access to the Amenities. (Headwater's Mot. to Dismiss, Ex. 11, §§ 2-3.)

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

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

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

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

The Termination IGA provided that "the Parties intend for certain of the Granby Ranch Districts, specifically GRMD, to operate independently" from Headwaters," and that "[d]ue to the amended service plans and the intention of certain of the Parties to operate independently from each other, there is no further need for the Master IGAs." The Termination IGA further provided that Headwaters, the Plaintiff, and GRMD Nos. 2-8 have "fully satisfied their obligations under the Master IGAs" and those districts waived any right to pursue claims and damages against each other.

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

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

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

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

11. Procedural History.

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

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

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

RULING

I. Standing

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

1. Standard of Review

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

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

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

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

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

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

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

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

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

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

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

Third-party beneficiaries may be entitled to standing if they meet specific criteria. The individual or entity, not a party to an express contract, may bring an action on the contract if (1) the parties to the agreement intended to benefit that third party; and (2) if the benefit claimed is a direct and not merely an incidental benefit of the contract. SK Peightal Engineers, LTD v. Mid Valley Real Estate Sols. V, LLC, 342 P.3d 868, 872 (Colo. 2015). Thus, the inquiry examines whether the plaintiff is an intended or incidental beneficiary to the alleged contract:

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

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

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

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

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

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

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

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

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

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

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

[13] Neither party raises an ambiguity issue.

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

a. The LPA.

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

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

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

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

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

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

> e. This instrument shall merge all undertakings, representations, understandings, and agreements whether oral or written, between the Parties with respect to the Leased Premises and the provisions of this Lease and shall constitute the entire Lease unless otherwise hereafter modified by both Parties in writing.

> f. This instrument shall also bind and benefit, as the case may require, the heirs, legal representatives, assigns and successors of the respective Parties, and all covenants, conditions and agreements herein contained shall be construed as covenants running with the land. This instrument shall not become binding upon the Parties until it shall have been executed and delivered by both Landlord and Tenant.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

c. The 2008 Granby IGA.

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

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

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

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

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

II. Failure to State a Claim.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

The Court addresses the breach of contract claim first.

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

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

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

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

i. 2003 Master IGA and Service Plans

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

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

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

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

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

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

ii. 2008 Granby IGA

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

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

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

iii. 2016 Granby IGA

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

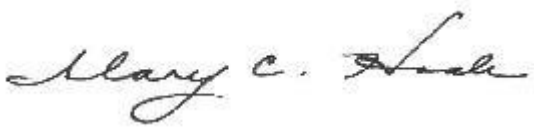
The Second Amended Complaint does not allege that maintenance or operation of the Amenities by Headwaters under the LPA was discretionary or that either Headwaters or GRH (or its successors in interest) had the "power to set or control the terms of performance after formation." See McDonald, 348 P.3d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

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

CONCLUSION

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

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



Mary C. Hoak, District Court Judge