IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO

Civil Action No. 1:23-cv-01351-RMR-STV

GRCO LLC, a Missouri limited liability company,

Plaintiff,

v.

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

Defendant.

PLAINTIFF'S OBJECTIONS TO
RECOMMENDATION OF MAGISTRATE JUDGE

Pursuant to Fed. R. Civ. P. 72(b)(2) and 28 U.S.C. § 636(b)(1)(C), Plaintiff, GCRO LLC ("Plaintiff"), by and through undersigned counsel, respectfully objects to a portion of Magistrate Judge Scott T. Varholak's December 21, 2023, Recommendation ("Report") [ECF No. 42] concerning Defendant's Motion to Dismiss [ECF No. 19].

I. INTRODUCTION

Defendant Granby Ranch Metropolitan District ("GRMD" or "District") moved to dismiss each of Plaintiff's nine counts in its Amended Complaint on various grounds. The Magistrate's Report recommends that Defendant's Motion be denied to the extent it seeks to dismiss Counts I, II, V, VII and VIII ("Denial Recommendations"), but granted to the extent it seeks to dismiss Counts III, IV,

VI and IX ("Dismissal Recommendations"). The Denial Recommendations are proper, supported by law and should be adopted and affirmed.

While Plaintiff disagrees with the Dismissal Recommendation as a whole, it specifically objects to the recommendations that Counts III and IV be dismissed. Plaintiff respectfully disagrees with the Magistrate's finding that Plaintiff pleaded only a generalized grievance that fails to give rise to constitutional standing to challenge GRMD's violation of Colo. Rev. Stat. § 29-1-803(1) in Count III and the Magistrate's recommendation that Count IV be dismissed for failure to plausibly plead a material modification of the Service Plan.

GRMD's unlawful deposit and use or holding of Capital Facilities Fees[1] since 2019, is at issue in Counts III and IV. Pursuant to the Service Plan and the 2006 Resolution, the Capital Facilities Fee is solely to be used to fund improvements benefiting the properties located in the District. The Capital Facilities Fee is an exaction, special fee or assessment that, according to well-established Colorado law, cannot be used for general expenses of government. To ensure proper use of the Capital Facilities Fees, Colorado law requires those fees be deposited in an interest-bearing account which clearly identifies the category, account, or fund of capital expenditure for which the charge was imposed and each such category, account, or fund must be accounted for

[1] Capitalized terms not defined herein shall have the meaning set forth in Plaintiff's Response to Defendant's Motion to Dismiss. [ECF No. 32]

separately. Plaintiff's complaint alleges that, since 2019, GRMD has deposited the Capital Facilities Fees collected from GRCO into its General Fund wherein they were commingled with other funds to be used for administrative expenses, including litigation costs.

In Count III, Plaintiff challenges GRMD's failure to deposit the fees into an account specifically identified for debt repayment of the Improvements in violation of C.R.S. §29-1-803(1). Plaintiff seeks reimbursement for the fees it paid in 2022 and declaratory and injunctive relief with respect to future fees that it will be required to pay. The Magistrate's dismissal recommendation of Count III for lack of standing overlooks Plaintiff's allegations in the Amended Complaint [ECF No. 15, ¶ 72] and Plaintiff's Response to Defendant's Motion to Dismiss ("Response") [ECF No. 32, p. 18] setting forth its particularized, concrete and actual harm—GRMD's illegal and unconstitutional use of Plaintiff's Capital Facilities Fees.

In Count IV, Plaintiff pleads a hypothetical claim. To the extent GRMD is using or holding Capital Facilities Fees for the purpose of undertaking capital improvements, as opposed to financing capital improvements, that action is not authorized under the Service Plan. Plaintiff does not assert that GRMD has taken actions in violation of the Service Plan, only that a material modification would occur ***if*** GRMD is using (or holding) the funds for this unauthorized purpose.

For the reasons set forth herein, Plaintiff requests the District Court reject

the Magistrate's recommendation with respect to Counts III and IV and deny Defendant's motion to dismiss those claims.

II. STANDARD OF REVIEW

Fed. R. Civ. P. 72 sets forth the standard of review for rulings made by magistrates. When reviewing a magistrate's recommendation on a "dispositive motion" such as a Fed. R. Civ. P. 12 motion to dismiss, the district court reviews that recommendation *de novo*. Fed. R. Civ. P. 72(b)(3); *United States v. 2121 East 30th Street*, 73 F.3d 1057, 1060 (10th Cir. 1996).

III. ARGUMENT

A. Plaintiff Has Standing to Assert Count III.

To establish the jurisdictional prerequisite of Article III standing, a plaintiff must allege (1) an injury in fact, (2) that is fairly traceable to the challenged conduct of the defendant, and (3) that is likely to be redressed by a favorable judicial decision. *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560-61 (1992). An injury in fact requires an invasion of plaintiff's legally protected interest that is "concrete and particularized" and "actual or imminent, not conjectural or hypothetical." *Id.* To satisfy that particularized requirement, the alleged injury must be personal or distinct to the plaintiff. *Spokeo, Inc. v. Robins*, 578 U.S. 330, 340 (2016). To satisfy the concreteness requirement, the injury must actually exist; be real and not abstract. *Id.* An injury is actual or imminent when it has occurred or is certainly pending. *See Lujan*, 504 U.S. at 606, n.2. "[E]ach element [of standing] must be supported in the same way as any other

matter on which the plaintiff bears the burden of proof, *i.e.*, with the manner and degree of evidence required at the successive stages of the litigation. *Id.* at 561. General factual allegations of injury caused by defendant's conduct suffice at the pleading stage. *Id.*

Here, Plaintiff's alleged injury in fact—GRMD's illegal and unconstitutional use of its Capital Facilities Fees—is ***particularized*** in that it is personal and distinct to Plaintiff; ***concrete*** in that it is unlawful to use Capital Facilities Fees in a manner not authorized under the Service Plan or under Colorado law; and ***actual*** in that the injury occurred when the 2022 fees were deposited into the General Fund and will continue to occur as Plaintiff is required to pay Capital Facilities Fees to obtain building permits for construction on its remaining lots in the District. Plaintiff is not challenging a government body's use of general tax funds; it is challenging the specific use of specific dollars it has paid to GRMD for a specific purpose.

Count III asserts more than a mere violation of C.R.S. § 29-1-803(1). GRMD's violation of the statute resulted in the unlawful commingling Plaintiff's Capital Facilities Fees payment with funds collected and available for general administrative expenses. In recommending dismissal of Count III for lack of standing, the Report overlooks Plaintiff's alleged injury allegation, and instead focuses on Plaintiff's discussion of the apparent purpose of the statutory requirement. [ECF No. 32, p. 17]. The Report relies on *U.S. v. Richardson*, in

finding the desire for transparency to government expenditures does not confer standing to challenge that constitutional requirement. [ECF No. 42, p. 27].

Richardson, however, is distinguishable. There, a taxpayer challenged provisions of the Central Intelligence Agency Act concerning public reporting of the CIA's expenditures. *U.S. v. Richardson*, 418 U.S. 166, 168-69 (1974). The Act provides, in relevant part: "a regular Statement and Account of the Receipts and Expenditures of all public Money shall be published from time to time." *Id.* at 168. The plaintiff requested information setting forth the CIA's detailed expenses, but was provided with combined statements of receipts and expenditures of the US government. *Id.*

Taxpayer sued seeking a declaration that this provision of the CIA Act is unconstitutional and an injunction enjoining defendants from representing fulfillment of the CIA Act through publication of the combined statement. Plaintiff's alleged injury was its inability "to obtain a document that sets out the expenditures and receipts of the CIA … and asked to accept a fraudulent document." *Id.* at 169. The Court found plaintiff's grievance to be a generalized grievance undifferentiated and common to all members of the public. *Id.* at 176. Plaintiff did not allege the CIA funds were being spent in violation of specific constitutional limitations. *Id.* at 175. Nor did he allege he was in danger of suffering a particular concrete injury, not shared by other members of the public, as a result of the operation of the statue. *Id.* at 177. Accordingly, the Court held taxpayer lack standing. *Id.* at 180.

Unlike the *Richardson* plaintiff, Plaintiff alleges a particularized, concrete and actual harm caused directly by GRMD's violation of C.R.S. § 29-1-803(1). Plaintiff is not merely seeking transparency with respect to GRMD's expenditures. The relief that Plaintiff seeks—a declaration that GRMD has no right to deposit Capital Facilities Fees into its General Fund for payment of general administrative and litigation expenses under C.R.S. § 29-1-803, an injunction enjoining GRMD from future collection of Capital Facilities Fees for deposit into its General Fund; and an award of damages reimbursing Plaintiff all Capital Facilities Fees paid from 2022 through the date of judgment in this case—will redress Plaintiff's injury caused by GRMD. This claim could not be asserted by all members of the public. Only those who paid a Capital Facility Fee to obtain a building permit since 2019 could bring a similar claim.

The fact that others could may have the same grievance does not minimize the harm to Plaintiff. *Massachusetts v. E.P.A.*, 549 U.S. 497, 522 (2007) (That these climate-change risks are "widely shared" does not minimize Massachusetts' interest in the outcome of this litigation.); *Fed. Election Comm'n v. Akins*, 524 U.S. 11, 24 (1998) ("[W]here a harm is concrete, though widely shared, the Court has found 'injury in fact'"); *Pub. Citizen v. U.S. Dept. of Justice*, 491 U.S. 440, 449–50 (1989) ("The fact that other citizens or groups of citizens might make the same complaint after unsuccessfully demanding disclosure under FACA does not lessen appellants' asserted injury.").

Here the grievance is not widely shared; and it certainly not shared by all members of the public. Plaintiff has adequately pled a particularized, concrete, and actual injury caused by Defendant that is redressable by a favorable judicial decision, the District Court should reject the Magistrate's recommendation and deny Defendant's Motion to Dismiss as to Count III.

B. Use the Funds To Construct Capital Facilities Would Be A Violation Of The GRMD's Service Plan.

Both GRMD and the Magistrate misconstrue Plaintiff's Count IV. The Magistrate emphasized that GRMD's Service Plan allows it to finance capital improvements. Plaintiff does not assert that GRMD cannot ***fund*** improvements. Rather, Plaintiff asserts that the Service Plan limits GRMD's role to funding improvements, as opposed to constructing improvements.

The Service Plan identifies two distinct districts—the Service District and the Tax District. [ECF No. 15 at Ex. 2]. The Service District was given the power "to provide the services and facilities" described therein. *Id.* at § II. The Tax District was given the power "to finance public improvements, impose taxes, and collect revenue or take other actions in cooperation with the Service District that may be necessary to provide the services and facilities needed within the Service Area." *Id.*

GRMD's Service Plan provided: "Until the Service District [Headwaters] is consolidated or dissolved in accordance with the District IGA [Master IGA set forth below], **only the Service District [Headwaters] will have the authority**

to provide services and complete public improvements within the Service Area." *Id.* at Art. III (emphasis added). The Complaint alleges that Headwaters has not been consolidated or dissolved, and the Master IGA referenced in the Service Plan has been terminated by agreement of Headwaters and GRMD. [ECF No. 15, ¶ 20]. Thus, Headwaters – the Service District – is the only district authorized to construct improvements. GRMD's role is limited to financing any such improvements.

Count IV is a hypothetical claim. *See* Fed. R. Civ. P. 8(d)(2) ("A party may set out 2 or more statements of a claim or defense alternatively or hypothetically, either in a single count or defense or in separate ones."); *Clark v. Haas Group, Inc.*, 953 F.2d 1235, 1239 (10th Cir. 1992) ("Rule 8(d)(2) permits a party to set forth two or more statements of "claim" alternatively or hypothetically").

Use of the Capital Facilities Fees is limited to "financing the acquisition, reimbursement, construction, replacement, maintenance and repair of the Improvements," including authorized debt service. [ECF No. 15, ¶ 43]. Plaintiff alleges that since 2019, the Capital Facilities Fees – including those paid by Plaintiff – have been deposited into GRMD's general fund and comingled with other funds used for unrestricted purposes. *Id.* at ¶¶ 51-53. The Complaint alleges that, "The Service Plan does not allow GRMD to undertake capital improvements or collect or hold funds for this purpose," and that, "to the extent" GRMD has deposited Capital Facilities Fees collected since 2019 into its unrestricted General Fund for this improper purpose, that action constitutes a

material modification of its Service Plan." *Id.* at ¶ 84. Plaintiff is thus asserting that GRMD cannot use the Capital Facilities Fees to fund its own construction of improvements, and invokes the Court's statutory authority to enjoin a District's material modification of its Service Plan. This claim states a cause of action for relief C.R.S § 32-1-207(1)(3)(a).

IV. CONCLUSION

For the reasons stated above and in Plaintiff's Response to Defendant's Motion to Dismiss [ECF No. 32], incorporated herein, the Magistrate's Recommendation should be adopted to the extent the Magistrate recommends that Defendant's Motion be denied with respect to Counts I, II, V, VII and VIII. Plaintiff respectfully requests that this Court reject the Magistrate's Recommendation with respect to Counts III and Count IV, and instead deny GRMD's Motion with respect to those claims as well.

Respectfully submitted this 4th day of January, 2024.

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CERTIFICATE OF SERVICE

I hereby certify that on January 4, 2024, I electronically filed the foregoing, **PLAINTIFF'S OBJECTION TO RECOMMENDATION REGARDING DEFENDANT'S MOTION TO DISMISS** with the Clerk of Court using the CM/ECF system which will send notification of such filing to the following:

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