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.

DEFENDANT GRANBY RANCH METROPOLITAN DISTRICT'S RESPONSE TO PLAINTIFF'S OBJECTIONS TO RECOMMENDATION OF MAGISTRATE JUDGE

Defendant Granby Ranch Metropolitan District (the "District"), through its counsel, submits its Response to Plaintiff's Objections to Recommendation of Magistrate Judge (ECF No. 43, dated January 4, 2024) and states as follows:

INTRODUCTION

This action concerns a developer's suit against a Title 32 special district for imposition of a Capital Facilities Fee (a one-time per lot/parcel charge collected from the property owner prior to building thereon to defray the cost of facilities) ("CFF") that has been in effect for close to two decades. The fee was duly imposed in 2005 to defray millions of dollars of improvements in the district, including but not limited to entrance monuments, a major entrance road to connect the development to a highway, and storm and sanitary sewer major lines. These improvements were made years ago and benefit the entire district, not just some particular lots. The fee was allocated and applies to all

lots within the district, and roughly 600 homeowners have already paid their fair share of the costs. Plaintiff, however, desires to be exempt from paying the fees on the ground that there are no plans for new improvements to be made in the future. Plaintiff's argument is misplaced. The fee was imposed to defray the costs of improvements and still serves the same purpose by reimbursing or repaying debt related to those costs. That the fee does not become due and payable until a particular lot is ready for development does not exempt new developers (like Plaintiff), who develop the lots after the improvements have already been made.

The District moved to dismiss all nine of Plaintiff's claims on various grounds. (ECF No. 19). On December 21, 2023, Magistrate Judge Varholak recommended dismissal of Counts III, IV, VI, and IX, but not the other counts. (ECF No. 43 – Recommendation of United States Magistrate Judge at 33-34). Plaintiff's objection concerns only the recommendation for dismissal of Count III (alleging a violation of C.R.S. § 29-1-803(1)) and Count IV (alleging an illegal material modification of the District's Service Plan). As the Magistrate Judge correctly concluded, Plaintiff lacks standing to assert Count III. Plaintiff failed to meet its burden to show that it suffered the requisite injury in fact from any alleged violation of C.R.S. § 29-1-803(1). As to Count IV, Plaintiff failed to sufficiently allege an illegal material modification of the District's Service Plan. The Court should adopt the Magistrate Judge's Recommendation for dismissal and dismiss those claims with prejudice.

STANDARD OF REVIEW

"A party's objections to the magistrate judge's report and recommendation must be both timely and specific to preserve an issue for de novo review by the district court or for appellate review." RMR Civ. Practice Standard 72.3(a) (quoting *U.S. v. 2121 E. 30th St.*, 73 F.3d 1057, 1060 (10th Cir. 1996)). "A party objecting to a Magistrate Judge's Recommendation must identify, with particularity, the specific portions of the Recommendation that are the basis for the Objection. Objections must include specific citations to the case record . . . that form the objecting party's arguments." RMR Civ. Practice Standard 72.3(b). The requirement for "specific" objections indicates that "the teachings of *Twombly* and *Iqbal* can be applied in the Rule 72 context." *Frazier v. Ortiz*, No. 07-cv-02131-CMA-KMT, 2010 U.S. Dist. LEXIS 22905, at *17 (D. Colo. Mar. 10, 2010), *aff'd,* 417 F. App'x 768 (10th Cir. 2011). Thus, "in the same way that '[a] pleading that offers labels and conclusions . . . will not do[,]' a party's objections to a Recommendation that offer only labels and conclusions . . . will not do." *Id.* (quoting *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009)). "[T]he practice of offering labels and conclusions may bar de novo review." *Id.* (citing *Manigaulte v. C.W. Post of Long Island Univ.,* 659 F. Supp. 2d 367, 372 (E.D.N.Y. 2009).

"In general, this Court disfavors the consideration of arguments and exhibits not made to the Magistrate Judge." RMR Civ. Practice Standard 72.3(b). "Should the objecting party seek to make arguments or introduce exhibits that were not raised before the Magistrate Judge, such party must expressly identify those arguments and/or exhibits

and explain why such omitted arguments and/or exhibits should be considered, in the first instance, upon Objection." *Id.*

ARGUMENT

I. THE MAGISTRATE JUDGE CORRECTLY DISMISSED COUNT III FOR LACK OF STANDING

"To obtain a determination on the merits in federal court, parties seeking relief must show that they have standing under Article III of the Constitution." *Ariz. Christian Sch. Tuition Org. v. Winn*, 563 U.S. 125, 129 (2011). To establish standing, a plaintiff must have suffered an injury in fact, there must be a causal connection between the injury and the conduct complained of, and it must be likely that the injury will be redressed by a favorable decision. *Id.* at 133 (citing *Lujan v. Defenders of Wildlife*, 504 U.S. 555 (1992)).

An "injury in fact" is an invasion of a legally protected interest which is (a) concrete and particularized, and (b) actual or imminent, not conjectural or hypothetical. *Id.* "[T]he injury must affect the plaintiff in a personal and individual way." *Id.*; *Richardson*, 418 U.S. at 179-80 (recognizing the "basic principle" that a plaintiff must show a "direct injury"). "An injury in fact must be both concrete and particularized." *Spokeo, Inc. v. Robins*, 578 U.S. 330, 340 (2016). "A 'concrete' injury must be 'de facto'; that is, it must actually exist." *Id.* In this era of frequent litigation and sweeping injunctions, the Supreme Court has mandated courts to be "more careful to insist on the formal rules of standing, not less so." *Ariz. Christian Sch. Tuition Org.,* 563 U.S. at 146.

Plaintiff fails to allege a cognizable injury for its claim. As the Magistrate Judge correctly held, Plaintiff's purported claim under C.R.S. § 29-1-803(1) rests on an impermissible "generalized grievance" that fails to give rise to constitutional standing.

(Recommendation at 26-27). The Magistrate Judge recognized the well-accepted rule that generalized grievances are insufficient to confer standing, and correctly relied on Supreme Court precedent applying the rule to dismiss a claim of violation of statutory accounting and reporting requirements. *Id.* (citing *United States v. Richardson*, 418 U.S. 166 (1974)).

The rule that federal courts do not serve as a forum for generalized grievances has a "lengthy pedigree." *Lance v. Coffman*, 549 U.S. 437, 439-41 (2007). A claim is a generalized grievance where the only injury plaintiff alleges is that the law has not been followed. *Lance*, 549 U.S. at 442; *see also id.* at 439-40 (citing *Fairchild v. Hughes*, 258 U.S. 126 (1922) for proposition that the general right "to require that the government be administered according to law and that the public moneys be not wasted" does not entitle a private citizen to institute a suit in the federal courts). "[U]nder Article III, an injury in law is not an injury in fact." *TransUnion LLC v. Ramirez*, 141 S. Ct. 2190, 2205 (2021); *Laufer v. Looper*, 22 F.4th 871, 876 (10th Cir. 2022) ("a statutory violation does not necessarily establish injury in fact."). Article III does not grant federal courts "freewheeling power to hold defendants accountable for legal infractions." *TransUnion LLC*, 141 S. Ct. at 2205.

Importantly, the Court must analyze standing "on a claim-by-claim basis." *Lupia v. Medicredit, Inc.*, 8 F.4th 1184, 1190 (10th Cir. 2021). Plaintiff's Objection improperly conflates standing for its other claims with that for the claim at issue. Count III alleges a "Violation of C.R.S. § 29-1-803(1)." (*See* Am. Compl. at 22). Specifically, Plaintiff alleges that the District's alleged deposit of CFFs into its general fund "violates the accounting requirements imposed by C.R.S. § 29-1-803(1)." (*Id.* ¶ 89). That statute provides:

> All moneys from land development charges collected, including any such moneys collected but not expended prior to January 1, 1991, shall be deposited or, if collected for another local government, transmitted for deposit, in an interest-bearing account which clearly identifies the category, account, or fund of capital expenditure for which such charge was imposed. Each such category, account, or fund shall be accounted for separately. The determination as to whether the accounting requirement shall be by category, account, or fund and by aggregate or individual land development shall be within the discretion of the local government. Any interest or other income earned on moneys deposited in said interest-bearing account shall be credited to the account. At least once annually, the local government shall publish on its official website, if any, in a clear, concise, and user-friendly format information detailing the allocation by dollar amount of each land development charge collected to an account or among accounts, the average annual interest rate on each account, and the total amount disbursed from each account, during the local government's most recent fiscal year.

C.R.S. § 29-1-803(1). As pertinent here, the statute addresses only the manner in which "land development charges" are to be deposited and accounted; it does not address the propriety of their collection or their use.[1] Plaintiff's argument that the alleged "injury in fact" here is the District's allegedly "illegal and unconstitutional use of its Capital Facilities Fees" is misplaced. (Objection at 5). To the extent Plaintiff contends that it has been injured by the District's allegedly improper ***collection or use*** of the CFFs, that may be

[1] Neither does it provide a private right of action or relief in the form of refunds of any such charges to the payor for any violation thereof as requested by Plaintiff. *See TransUnion LLC v. Ramirez*, 141 S. Ct. 2190, 2208 ("plaintiffs must demonstrate standing for ***each claim*** that they press and for ***each form of relief*** that they seek.") (emphasis added); *Bd. of Cty. Comm'rs v. HAD Enters., Inc.*, 533 P.2d 45, 46 (Colo. 1974) ("where the legislature has not seen fit to authorize a particular remedy in a statute, [the court] cannot supply one."

relevant to standing for its due process claim, not Count III—which is based solely on an alleged violation of the deposit/accounting statute.

Indeed, Plaintiff fails to allege any "direct injury" from the District's alleged violation of the statute. *See Ex parte Levitt*, 302 U.S. 633 (1937) (enforcing the "established principle" that plaintiff must show a "direct injury as a result of [governmental] action."). Plaintiff has suffered no concrete or particularized injury from any allegedly wrongful deposit of funds in violation of the statute. Plaintiff, like other property owners, would be subject to payment of the CFF regardless of the account or manner in which the funds are placed or how they are held. Any alleged misplacement of the funds does not affect Plaintiff in any personal, individualized, or concrete way.

Any arguable interest that Plaintiff may have in the manner in which the District deposits or accounts for the CFFs is a general interest shared with all other property owners in the District. Plaintiff's argument that its purported claim is not a generalized grievance because it cannot be asserted by "all members of the public" misses the mark. (Objection at 7). A claim may be a "generalized grievance" even though it is not common to ***all*** members of the public. *See Warth v. Seldin*, 422 U.S. 490, 499, 95 S. Ct. 2197, 2205 (1975) ("when the asserted harm is a 'generalized grievance' shared in substantially equal measure by all or a large ***class of citizens***, that harm alone normally does not warrant exercise of jurisdiction") (emphasis added); *O'Rourke v. Dominion Voting Sys.*, No. 21-1161, 2022 U.S. App. LEXIS 14625, at *7 (10th Cir. May 27, 2022) *cert. denied* 143 S. Ct. 489 (Dec. 5, 2022) (plaintiff's claim was a generalized grievance even though it was common to only a subset of the public—namely, all "registered voters" in the United

States). The Court should adopt the Magistrate Judge's recommendation and dismiss Count III.

II. THE MAGISTRATE JUDGE CORRECTLY DISMISSED COUNT IV

The Magistrate Judge correctly held that Plaintiff failed to plausibly plead a material modification of the Service Plan. (Recommendation at 28-29). For the sake of brevity, the District incorporates herein by reference all of its argument on this issue as stated in its Motion to Dismiss (ECF No. 19 at 12-15) and Reply in support thereof (ECF No. 41 at 7).

"[A] special district must conform to its service plan ***so far as practicable***." *Indian Mt. Corp. v. Indian Mt. Metro. Dist.*, 412 P.3d 881, 892-93 (Colo. App. 2016) (citing C.R.S. § 32-1-207(1) (emphasis added)) *cert. denied* No. 16SC879, 2017 WL 1449730 (Apr. 24, 2017). Only "material modifications" to the service plan must be approved by the board of county commissioners. *Id.* (citing C.R.S. § 32-1-207(2)(a)). The Special District Act defines "material modifications" as "changes of a basic or essential nature," including but not limited to the following:

> any addition to the types of services provided by the special district; a decrease in the level of services; a decrease in the financial ability of the district to discharge the existing or proposed indebtedness; or a decrease in the existing or projected need for organized service in the area.

C.R.S. § 32-1-207(2)(a). Approval for modification is ***not*** required for changes necessary only for the execution of the original service plan. *Todd Creek Vill. Metro. Dist. v. Valley Bank & Trust Co.*, 325 P.3d 591, 597 (Colo. App. 2013) (citing C.R.S. § 32-1-207(2)(a)).

The determination of whether a service plan has been materially modified involves a question of law. *Indian Mt. Corp.*, 412 P.3d at 893. To do so, the court must analyze the

language of the service plan and give effect to its plain and ordinary meaning. *Id.* A service plan has not been materially modified simply because a district takes an action that is not expressly permitted in the service plan. *See Todd Creek Vill. Metro. Dist. v. Valley Bank & Tr. Co.*, 325 P.3d 591, 598 (Colo. App. 2013) (rejecting argument that the issuance of general obligation debt constituted a material modification where the service plan only referenced revenue bonds because although the plan did not expressly allow issuance of general obligation debt, it also did not expressly disallow it).

The Magistrate Judge correctly observed that: the Service Plan does not prohibit the District from undertaking the construction or acquisition of any infrastructure, improvements, or facilities or to provide any related services within its Service Area. (Recommendation at 28-29); Plaintiff failed to show that the District lacked the ability to impose a facilities fee for construction or acquisition of Improvements or related services under the Service Plan; and Plaintiff has failed to establish a material modification claim. (*Id.* at 29).

The Service Plan expressly provides for the District's ability "to produce property tax and other revenue sufficient to pay the costs of operations and debt service expenses incurred for the public improvements." (*See* Am. Compl. Ex. 2 at 3, § I(A)(5)). It permits the District to issue revenue debt and other multiple-fiscal year financial obligations "in amounts sufficient to finance and construct all public improvements under the plan…." *Id.* at 14 (last ¶). It gives the District "the power to ***finance*** public improvements, ***impose*** property 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.* at 6, § III (emphasis added). Further, it permits the District to "rely upon various other revenue sources authorized by law to fund their financial obligations," including "the power to establish fees … or charges as provided in the Act…." *Id.* at 16 (first full ¶).

The Service Plan is broad and its terms refute the restrictive interpretation that Plaintiff proposes. It provides that any failure to reference a possible source of revenue available to the District in the plan itself "will not preclude the District[] from implementing any revenue source legally available to the District[], if needed to fund debt service, operations or other expenses." *Id.* at 16 (first full ¶); s*ee also id.* at 13, § V(B), 6th ¶: "No provision of the Service Plan shall be construed to restrict the issuance of any form or type of bond, note, or other multiple-fiscal year financial obligation of either District"; 7th ¶: "All bonds issued by the Districts ***may be payable from any and all legally available revenues*** of the Districts…." (emphasis added).[2]

Contrary to Plaintiff's position that it should be exempt from paying the CFFs, the Service Plan contemplated build-out of the development over 30 years to allow "the full costs of public improvements to be allocated fairly over the full build-out of the Development" to "avoid the imposition of disproportionate cost burdens upon the initial phases of the Development." (*See* Am. Compl. Ex. 2 at 4). The Service Plan clearly contemplates the collection of the CFFs not only for construction of improvements, but for

[2] Neither the First nor the Second Amendments to the Service Plan materially modify these provisions. (*See* Am. Compl. Exs. 3 & 4).

reimbursement of costs of improvements as well as retention of funds for any future improvements. Plaintiff fails to show any illegal material modification of the Service Plan.

Plaintiff's assertion that Count IV should avoid dismissal because it is a "hypothetical claim" should also be rejected. Although Rule 8(d)(3) permits a party to state as many separate claims as it may have, "regardless of consistency," it does not absolve a plaintiff from its burden under Rule 12(b)(6) to state plausible claims for which relief may be sought. Plaintiff fails to do that here. Instead, Plaintiff wishes to go on a fishing expedition "to confirm GRMD's use of these funds and whether same is for any purpose not allowed under GRMD's Service Plan." (ECF No. 32 – Resp. at 19). The plausibility pleading standard, however, "does not unlock the doors of discovery for a plaintiff armed with nothing more than conclusions." *Ashcroft*, 556 U.S. 662, 678-79 (2009); *cf. Curran v. FedEx Ground Package Sys.*, 593 F. Supp. 2d 341, 344 (D. Mass. 2009) (where plaintiffs simply "hypothesize" their claim, it is "exactly that kind of 'might be' pleading that the Supreme Court denigrated in *Twombly*") (citing *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544 (2007)). The Court should adopt the Magistrate Judge's recommendation and dismiss Count IV.

<u>CONCLUSION</u>

For these reasons and those stated in the District's Motion to Dismiss and Reply in support thereof, the District respectfully requests that the Court approve and adopt Magistrate Judge Varholak's recommendation for dismissal of Counts III and IV of Plaintiff's Amended Complaint and dismiss those claims with prejudice.

Dated this 18th day of January, 2024.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on January 18, 2024, I electronically filed the foregoing, **DEFENDANT GRANBY RANCH METROPOLITAN DISTRICT'S RESPONSE TO PLAINTIFF'S OBJECTIONS TO RECOMMENDATION OF MAGISTRATE JUDGE** with the Clerk of Court using the CM/ECF system which will send notification of such filing to the following:

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