DISTRICT COURT, GRAND COUNTY, COLORADO Court Address: Grand County Combined Courts 307 Moffat Ave Hot Sulphur Springs, CO 80451 Telephone No.: (970) 725-3357	DATE FILED: March 29, 2022 9:37 PM FILING ID: A8B6F602EA95D 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.: 2021CV030008 Div.: Rm.:
Counsel for Plaintiff: Charles E. Norton, #10633 Alicia M. Garcia, #53860 NORTON & SMITH, P.C. 600 17th Street, Suite 2150S Denver, Colorado 80202 Phone Number: (303) 292-6400 FAX Number: (303) 292-6401 E-mail: CNorton@NortonSmithLaw.com AGarcia@NortonSmithLaw.com	

PLAINTIFF GRANBY RANCH METROPOLITAN DISTRICT'S RESPONSE TO GR TERRA'S MOTION TO CONTINUE OR STAY RESPONSE TO MOTION FOR PARTIAL SUMMARY JUDGMENT PENDING DISCOVERY PURSUANT TO C.R.C.P. 56(F), REQUEST FOR EXPEDITED BRIEFING SCHEDULE, AND ALTERNATIVE REQUEST FOR ADDITIONAL TIME TO RESPOND IF MOTION IS DENIED

Plaintiff Granby Ranch Metropolitan District ("GRMD") through its undersigned counsel, submits the following Response to GR Terra, LLC's ("GR Terra") "Motion to Continue or Stay Response to Motion for Partial Summary Judgment Pending Discovery Pursuant to C.R.C.P. 56(f), Request for Expedited Briefing Schedule, and Alternative Request for Additional Time to Respond if Motion is Denied." ("Motion to Continue"). In support of its opposition to the Motion to Continue, GRMD states as follows:

INTRODUCTION AND STANDARD OF REVIEW

On March 15, 2022, GRMD filed its Motion for Summary Judgment on Defendant GR Terra's counterclaims, Counts I, II, and III. Under C.R.C.P. 121, section 1-15 1. (b), GR Terra's response to the Motion for Summary Judgment is due on or before April 5, 2022.

However, GR Terra has instead filed a Motion to Continue its response to the Motion for Summary Judgment "until discovery has been completed by the parties in accordance with the Case Management Order to be entered by this Court." Motion to Continue, p. 15. The Motion to Continue is supported by the affidavit of JoAnn T. Sandifer of the firm of Husch Blackwell LLP, which is counsel to both GR Terra and its co-defendant Headwaters Metropolitan District ("Headwaters").

Whether to grant a request for discovery pursuant to C.R.C.P. 56(f) lies within the discretion of the trial court. It is not an abuse of discretion to deny a C.R.C.P. 56(f) request if the movant has failed to demonstrate that the proposed discovery is necessary and could produce facts that would preclude summary judgment. *A-1 Auto Repair & Detail, Inc. v. Bilunas-Hardy*, 93 P.3d 598, 604 (Colo. App. 2004); *accord, Bailey v. Airgas-Intermountain Inc*., 250 P.3d 746, 751 (Colo. App. 2010).

GR Terra has failed to demonstrate that the proposed discovery is necessary and could produce facts that would preclude summary judgment. The Motion to Continue must be denied.

ARGUMENT

Ms. Sandifer's affidavit fails to meet the requirements of C.R.C.P. 56(f)

C.R.C.P. 56(f) provides that:

> Should it appear from the affidavits of a party opposing the motion that the opposing party cannot for reasons stated present by affidavit facts essential to justify its opposition, the court may refuse the application for judgment or may

> order a continuance to permit affidavits to be obtained or depositions to be taken or discovery to be had or may make such other order as is just.

Ms. Sandifer's affidavit fails to adequately state why GR Terra cannot present by affidavit (or other documentary evidence) facts essential to justify its opposition. Instead, the affidavit is a conclusory three paragraph document, stating that to the best of the affiant's knowledge and belief, "all the factual allegations" set forth in the Motion to Continue "are true and correct."

This does not meet the standard of C.R.C.P. 56(f). As the Court of Appeals held in *Bailey v. Airgas-Intermountain Inc*., the request must be specific, not conclusory. 250 P.3d at 751. The denial of a 56(f) request is not an abuse of discretion where the affidavit submitted by counsel for the non-moving party failed to identify any specific facts which would create a genuine issue of material fact, let alone identify what steps had been taken to obtain such facts and a plan for the future. *Id.*, citing *Garcia v. United States Air Force*, 533 F.3d 1170, 1179-80 (10th Cir. 2008) (decided under the identical Fed. R. Civ. P. 56(f)).

As the *Bailey* Court further detailed in citing *Committee for the First Amendment v. Campbell*, 962 F.2d 1517 (10th Cir. 1992), a proper C.R.C.P. 56(f) request will meet certain particular requirements, including the following: (1) explaining why facts precluding summary judgment cannot be presented; (2) identifying the probable facts not available and what steps have been taken to obtain those facts; and (3) explaining how additional time will enable (the non-moving party) to rebut movant's allegations of no genuine issue of fact. 962 F.2d at 1522.

The application of these standards to Ms. Sandifer's affidavit and the specific issues raised in the Motion for Summary Judgment compel denial of the Motion to Continue. This is so, despite the fact that GR Terra is precluded from conducting formal discovery prior to the entry of a case management order by the terms of C.R.C.P. 16 (b)(11). *Bailey*, 250 P.3d at 752. This is

particularly important where the non-moving party is in control of the information necessary to oppose summary judgment. *Id.*

GR Terra, Headwaters, and Gray Jay are in control of the information necessary to oppose summary judgment

As the Court of Appeals reasoned in *Bailey v. Airgas-Intermountain Inc*., "Which party controls the information necessary to oppose summary judgment is often dispositive." *Id.* A C.R.C.P. 56(f) request is properly denied where all of the facts needed to raise a genuine issue of material fact were within control of the party opposing summary judgment. *Id.* at 751, citing *In re Marine Asbestos Cases*, 265 F.3d 861, 869 (9th Cir. 2001).

GR Terra, Headwaters, and Gray Jay are in control of the information required to raise a genuine issue of material fact. On page 13 of the Motion to Continue, GR Terra argues that it will seek to discover the minutes of the meetings of GRMD and Headwaters at which various agreements were discussed as well as "communications between the parties" relating to those agreements. Yet the same counsel, Ms. Sandifer and Ms. Steiner of Husch Blackwell LLP, represent both Headwaters and GR Terra. Ms. Sandifer's affidavit provides no explanation of why GR Terra is forced to make a formal discovery request of Headwaters to produce minutes of its meetings or communications with GRMD, requests in which counsel would be serving the discovery on themselves under C.R.C.P. 5 (b)(1) or taking the deposition of their own client.

GR Terra faces a similar problem with regard to the issue of whether Gray Jay was justified in providing a notice to Headwaters that Gray Jay was electing to terminate the Lease Purchase Agreement (LPA) at issue in this case. On pages 7-8 of the Motion to Continue, GR Terra argues that there is a factual dispute as to whether Headwaters ceased operations of the Amenities during 2020 so as to justify Gray Jay's purported notice of termination. As GRMD

will argue in the balance of this Response, that notice is ineffective as a matter of law under the express terms of the LPA. However, whether or not that is the case, GR Terra provides no explanation of why it cannot simply ask Gray Jay for an affidavit about what facts supported its contention that Headwaters had ceased to operate the amenities during a relevant point in time. The two parties have closely coordinated their defense, to the extent of substantially copying portions of their motions to dismiss into one another's arguments. The fact that GR Terra cannot generate a simple sworn affidavit from Gray Jay is telling.

In the balance of this Response, GRMD will detail with regard to each of the issues raised in its Motion for Summary Judgment why GR Terra has failed to demonstrate that the proposed discovery is necessary and could produce facts that would preclude summary judgment.

GR Terra has failed to demonstrate the discovery is necessary or that it will produce facts precluding summary judgment on the issue of Headwater's purported failure to appropriate funds to make payments on the LPA

Counts I and III of the GR Terra counterclaims have an identical basis. This is that "the LPA was terminated in its entirety "through foreclosure of the Leased Premises, or, alternatively, through Gray Jay's notice of termination, or, alternatively, due to Headwaters' failure to appropriate funds for rental payments as of January 1, 2021." *See* Answer and Counterclaims, paragraphs 120 A. and 136 A. However, GR Terra has not shown that discovery is necessary with regard to these issues or that any discovery will give rise to triable issues of fact precluding summary judgment.

The appropriations issue is discussed extensively on pages 8-12 of GRMD's Motion for Summary Judgment. In brief, GRMD argues that the minutes of Headwaters Board meetings and

the budget resolution for fiscal year 2021 provide no support for the proposition that Headwaters had elected "not to appropriate funds to pay amounts due under the Lease as set forth in Section 3.c" of the LPA. As detailed in the Motion for Summary Judgment, section 3.c includes extensive procedural safeguards to protect Headwater's rights to keep the LPA in full force and effect. The President of Headwaters is to request the appropriation of Amenity Fees to make lease payments and is to exhaust all administrative remedies and appeals in the event that portion of the budget is not approved. In section 14 d. of the LPA, Headwaters specifically covenants that "the chairman or president of Tenant will request funds to make payments in each Renewal Term."

GRMD offered publicly available minutes of Headwaters to show that there is no evidence that these preconditions to terminating the IGA were met, and considerable evidence that the required actions by Headwaters did not take place. GR Terra's response is essentially silence. On page 13 of its Motion to Continue, GR Terra does argue that "GRMD does not dispute" that Headwaters failed to appropriate the funds, and that GRMD "admits" that the Budget Resolutions are hard to interpret. However, the thing that is "hard to interpret" about the Budget Resolution for the 2021 fiscal year is that Headwaters does not show it anticipates receiving any Amenity Fees at all in 2021. Motion for Summary Judgment, Exhibit B, "Headwaters Metropolitan District, Lease Purchase Agreement Special Revenue Fund, 2021 Adopted Budget." (This page is attached to this Response as **Exhibit 1** for the Court's convenience of reference). If no Amenity Fees are collected in a given fiscal year under the LPA, no rent is due, and no appropriation would be required. LPA, section 3a. For this reason, GRMD does not concede that the evidence demonstrates that Headwaters failed to appropriate the lease payments.

However, this specific point about whether or not Headwaters appropriated the funds is not dispositive. What does permit summary judgment is that there is no evidence that Headwaters undertook the procedures in section 3a and considerable evidence that it did not.

The remainder of GR Terra's response on this argument is a general pitch that it should be able to conduct discovery. Yet the issue involves actions by the Board of Directors of Headwaters in October of 2021, long after this action was commenced by GRMD in February of 2021 and approximately three months after the Second Amended Complaint was filed on July 6, 2021. The events of the Headwaters Board meeting on October 15, 2021, at which the 2021 budget was adopted are known to Headwaters, which has the same counsel as GR Terra. If there are facts that contradict what the minutes show, or raise additional questions about section 3.c, GR Terra can present them. Discovery is unnecessary on this point, and it could produce nothing that would preclude summary judgment on the issue.

GR Terra has failed to demonstrate the discovery is necessary or that it will produce facts precluding summary judgment on the issue of whether the LPA was properly terminated by Gray Jay under section 10 of the LPA

GR Terra also contends in Counts I and III that the LPA was terminated by virtue of a notice given by Gray Jay in November of 2020 that Headwaters had ceased to operate the Amenities on the Leased Premises for 30 days or longer and hence the Lease had been terminated under section 10 of the LPA. While GR Terra confusingly characterizes this notice as having been given in November of 2020 (Motion to Continue, p. 3) and in November of 2021 (Motion to Continue, p. 7), it does appear that GR Terra is talking about a letter that was sent by GP Granby Holdings, LLC (now Gray Jay) on November 11, 2020, addressed to Headwaters. A copy of that letter is attached to this Response as **Exhibit 2** for the Court's convenience of

reference. GR Terra now seeks to defer a response to the Motion for Summary Judgment indefinitely while the parties seek discovery about the issue of whether Gray Jay had a basis for giving notice under section 10 of the LPA.

As GR Terra freely concedes, "Neither GR Terra nor Gray Jay owned the Property at the time of the alleged cessation of operations." Motion to Continue, ¶ 20. In fact, GP Granby Holdings, LLC (renamed Gray Jay) had received a Public Trustee's Deed to the subject property on August 27, 2020. *See* GR Terra Answer and Counterclaims, ¶ 35. In other words, Gray Jay provided notice of termination concerning a purported cessation of operations that took place at a time when it was not the Landlord under the LPA. *See* LPA, sect. 13 (successors to the Lender shall succeed to the interests of the Landlord). However, under the express language of section 10, it is the Landlord which may, "at its sole discretion and after at least 10 days advance notice to Tenant (which notice may be given within 10 days after the Tenant ceases operation of the Amenities) elect to terminate this Lease as of such future date designated by Landlord in such notice...." There is no evidence that the Landlord at the time of the alleged cessation of operations, Granby Realty Holdings LLC, the original signer of the LPA, gave any notice of its intent to terminate the LPA due to a cessation of operations. There is no evidence that such a notice was given within 10 days after Headwaters ceased operation of the Amenities, if in fact such a cessation took place. There is no evidence that Granby Realty Holdings LLC gave such a notice including a date certain in the future that the Lease would be terminated. Under the express language of the LPA, the notice given by Gray Jay was ineffective as a matter of law.

In an effort to generate a triable issue of fact, GR Terra attaches the affidavit of Matt Girard, currently the President of GRMD. GR Terra mistakenly characterizes this email as having been dated in April of 2021 (Motion to Continue, ¶ 18) although it was actually sent on

April 21, 2020. *See* Motion to Continue, Ex. 1. It should first be noted for the purposes of clarity that Mr. Girard is asking Headwaters to consider terminating its contract golf course manager, Granby Ranch Amenities, LLC. He is not asking Granby Realty Holdings, LLC, the Landlord, to terminate the LPA with Headwaters.

More important for the purposes of summary judgment, if this email does raise any issues about whether the Amenities ever ceased to be operated so as to potentially give rise to termination under the LPA, it does so with regard to events that had already taken place (according to Mr. Girard in the email) by April 21, 2020. As GRMD noted in the Motion for Summary Judgment, p. 13, Headwaters received $341,713 of "Golf Course Revenues" during 2020 and expended $338,490 in expenditures for golf course operations. This had to have been received between the date of Mr. Girard's email and the date of Gray Jay's purported "notice." Headwaters has also admitted in its answer to counterclaims that "on or about May 30, 2020 the Headwaters Board voted and approved Touchstone Golf as the new operating entity for the golf amenities." Headwaters' Answer to Counterclaims, ¶ 45. There is simply no evidence that a notice was given by the Landlord in a timely way (within 10 days) of a termination of Headwaters' Lease by virtue of a cessation of operations that happened prior to April 21, 2020, and Headwaters continued to operate the Amenity after that date.

GR Terra has failed to show that discovery is necessary or that it will produce facts precluding summary judgment. Gray Jay offers no affidavit concerning the facts that underlie its untimely notice of November 11, 2020. Ms. Sandifer's affidavit is silent about any attempt to ask for one. GR Terra provides no affidavit from Headwaters describing the facts behind these events to show that there is a triable issue. This is far short of the showing required by *Bailey v. Airgas-Intermountain Inc*. for this Court to exercise its discretion to grant GR Terra an open-

ended continuance not to respond to the motion for summary judgment. The Motion to Continue must be denied.

GR Terra has failed to demonstrate the discovery is necessary or that it will produce facts precluding summary judgment on the issue of whether the LPA was terminated by a public trustee foreclosure

GR Terra's position on this issue has shifted over time. It first maintained that the LPA was not a covenant running with the land and so was wiped out through foreclosure as a junior interest. It now maintains that such covenants can be wiped out through foreclosure, and in Count II insists that the covenant running with the land has been released through documents entered into between Headwaters and GRMD and the changed relationship between the parties.

With regard to the waiver and release issue, GR Terra raises an Exclusion Agreement and First Amendment to the 2006 Master IGA, both entered into in 2010. Motion to Continue, ¶ 31. If GR Terra is required to respond to the Motion for Summary Judgment, it would have to tell this Court specifically what it is in these documents that it believes raises a triable issue of fact. GRMD could then respond. Instead, GR Terra simply asks to conduct discovery to see if there is something about these documents that might raise an issue of waiver and release. This is far short of a demonstration of necessity.

In stark contrast, GRMD has provided this Court with Headwaters own budget documents in Exhibit B to the Motion for Summary Judgment. For the 2019 Budget Year, Headwaters appropriated $250,000 for the Lease Purchase Agreement Fund. It collected and appropriated $230,000 in such fees in 2017. It once again appropriated $250,000 for the Lease Purchase Agreement Fund for 2020. It behaved in no way like a party that believed the LPA had been relinquished, terminated, or waived through agreements executed in 2010.

Perhaps most striking, Headwaters has continued to impose and collect the Amenities Fee into 2022. Motion for Summary Judgment, Exhibit C. Under section 3c. of the LPA, "If actual Amenities Fees collected during any fiscal year exceed the amount budgeted for Rental Payments for such year, the Board (of Headwaters) shall amend its budget during such fiscal year to allow for payment of such additional Amenity Fees." The conduct of Headwaters in continuing to collect the Amenities Fee alone precludes GR Terra's waiver argument.

CONCLUSION

GR Terra should be required to respond to the Motion for Summary Judgment. Doing so will allow this Court to evaluate whether there are disputed issues of material fact which can then be the subject of further discovery. GR Terra has failed to show why additional discovery is necessary or that it will produce facts precluding summary judgment, and the Motion to Continue must be denied.

Dated this 29th day of March, 2022.

NORTON & SMITH,
A Professional Corporation

s/ Charles E. Norton
Charles E. Norton, #10633
Alicia M. Garcia, #53860
Counsel for Plaintiff

CERTIFICATE OF SERVICE

I certify that on the 29th day of March, 2022, a true and correct copy of the foregoing **RESPONSE TO GR TERRA'S MOTION TO CONTINUE OR STAY RESPONSE** was served electronically and/or sent via U.S. Mail, postage prepaid to the following:

Mark Champoux, # 40480
Kyler Burgi, # 46479
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Counsel for Defendant Headwaters Metro. District and GR Terra, LLC

S/ Mandi Kirk
Mandi Kirk, Paralegal
NORTON & SMITH, P.C.

HEADWATERS METROPOLITAN DISTRICT
LEASE PURCHASE AGREEMENT (LPA) SPECIAL REVENUE FUND
2021 ADOPTED BUDGET - MODIFIED ACCRUAL BASIS
WITH 2019 & 2020 ACTUAL AMOUNTS
FOR THE YEARS ENDED AND ENDING DECEMBER 31,

	2019 Actual	2020 Actual	2021 Adopted
REVENUES			
Amenity fee	$ 120,000	$ 10,000	$ -
Interest	5	2	-
Total revenues	120,005	10,002	-
EXPENDITURES			
Lease-purchase payments	120,000	10,000	-
Total expenditures	120,000	10,000	-
EXCESS OF REVENUES OVER EXPENDITURES	5	2	-
Other financing uses			
Transfer to general fund	-	-	(1,082)
Total other financing usus	-	-	(1,082)
NET CHANGE IN FUND BALANCE	5	2	(1,082)
BEGINNING FUND BALANCE	1,075	1,080	1,082
ENDING FUND BALANCE	$ 1,080	$ 1,082	$ -

EXHIBIT B

DAVIS
GRAHAM &
STUBBS

Christopher L. Richardson
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November 11, 2020

Via FedEx Overnight Delivery and Email

Headwaters Metropolitan District
c/o Marchetti & Weaver LLC
28 Second Street, Suite 213
Edwards, CO 81632
Attn: Eric Weaver
eric@mwcpaa.com

Headwaters Metropolitan District
c/oWhite, Bear, Ankele, Tanaka, & Waldron
2154 E. Commons Ave, Suite 2000
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Attn: Clint Waldron and Gary R. White
cwaldron@wbapc.com

Re: Notice Regarding Status of Second Amended and Restated Lease Purchase Agreement

Mr. Weaver and Mr. Waldron,

As you know, our firm represents Granby Prentice, LLC ("Granby Prentice") and GP Granby Holdings, LLC ("GPGH"). We write to follow up on our September 1, 2020 letter to Headwaters Metropolitan District ("Headwaters") regarding the Second Amended and Restated Lease Purchase Agreement, dated December 31, 2012, by and between Granby Realty Holdings LLC ("GRH") and Headwaters (the "Second A & R LPA"). Capitalized terms not otherwise defined herein have the meanings ascribed to them in the Second A & R LPA.

GPGH acquired title to the Leased Premises via a non-judicial foreclosure proceeding completed through the Grand County Public Trustee. GRH and Headwaters both received formal notice of the foreclosure proceeding. The history of such proceeding is detailed in our earlier letter.

The non-judicial foreclosure proceeding operated to convey the Leased Premises to GPGH free and clear of all liens and encumbrances junior to the subject deed of trust, including the Second A & R LPA. *See* C.R.S. § 38-38-501.

To be clear, the Second A & R LPA no longer encumbers the Leased Premises, GPGH is not a successor to GRH under the Second A & R LPA, and GPGH is not bound by any terms, covenants, or provisions of the Second A & R LPA. Nevertheless, for the avoidance of doubt, and to whatever extent (if any) the Second A & R LPA is deemed still applicable to the Leased Premises or that GPGH is deemed the "Landlord" thereunder, on behalf our client, we are providing Headwaters notice that GPGH is hereby exercising

EXHIBIT L

any and all rights GPGH has to terminate the Second A & R LPA. Headwaters, the "Tenant" under the Second A & R LPA, has ceased to operate the Amenities for a period of more than thirty (30) days. Pursuant to Section 10 of the Second A & R LPA, and *only* to whatever extent the Second A & R LPA is still applicable to the Leased Premises, on behalf of our client, we hereby provide notice to Headwaters that GPGH is electing to terminate the Second A & R LPA due to such cessation of operations. To the extent not already terminated or extinguished by its terms or operation of law, the Second A & R LPA shall terminate pursuant to Section 10 and this notice at 12:01 a.m. on the date that is eleven (11) days after the later of (i) the date hereof or (ii) the date of receipt of this notice.

Please contact me if you have any questions regarding the foregoing.

Sincerely,

Chris Richardson

Christopher L. Richardson
Partner
for
DAVIS GRAHAM & STUBBS LLP
Attorneys for Granby Prentice, LLC and
GP Granby Holdings, LLC

EXHIBIT L