DISTRICT COURT, GRAND COUNTY, COLORADO 307 Moffat Avenue Hot Sulphur Springs, Colorado 80451	
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 ▲
Mark Champoux, #40480 Kyler Burgi, #46479 DAVIS GRAHAM & STUBBS LLP 1550 17th Street, Suite 500 Denver, Colorado 80202 Telephone: 303.892.9400 Facsimile: 303.893.1379 E-mail: mark.champoux@dgslaw.com kyler.burgi@dgslaw.com *Attorneys for Defendants Gray Jay Ventures, LLC and Granby Prentice, LLC*	Case No.: 2021CV30008 Div: 1

GRAY JAY VENTURES, LLC AND GRANBY PRENTICE, LLC'S MOTION FOR SUMMARY JUDGMENT

Pursuant to C.R.C.P. 56, Defendants Gray Jay Ventures, LLC ("Gray Jay") and Granby Prentice, LLC ("Granby Prentice," and collectively with Gray Jay, the "Lender Entities") hereby

move for summary judgment on Plaintiff Granby Ranch Metropolitan District's ("GRMD") claims against the Lender Entities (the "Lender Entities' Motion").[1]

INTRODUCTION[2]

More than a decade ago, the long-time developer of Granby Ranch—Granby Realty Holdings, LLC ("GRH")—put in place a complex structure of metro districts, associations, and agreements that, along with its own mismanagement, left GRH without enough money to continue as developer. With the development on the verge of failing entirely, Granby Prentice—which had, along with its predecessors, loaned tens of millions of dollars to GRH—initiated the processes necessary to set Granby Ranch on a more viable path, beginning with foreclosure proceedings on the development, including the ski area and golf course (as defined below, the "Leased Premises"). Granby Prentice was the highest and only bidder at the foreclosure sale and then assigned its right to take title to the Leased Premises to Gray Jay. After taking title on August 27, 2020, Gray Jay was a custodian of Granby Ranch for eight months, making the necessary capital investment to ensure that the golf course continued to operate and the ski season started on time, while trying to find a buyer for the property. On May 5, 2021, Gray Jay sold the property to GR Terra, an experienced developer that is executing its vision for placing Granby Ranch on a successful and sustainable trajectory.

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[1] **C.R.C.P. 121, § 1-15 Certification:** Counsel for the Lender Entities conferred with counsel for GRMD and counsel for GR Terra, LLC ("GR Terra") and Headwaters Metropolitan District ("Headwaters") regarding this Motion. GRMD opposes the relief sought. GR Terra and Headwaters do not oppose the relief sought.

[2] The Court is well-apprised of the background facts giving rise to this dispute. (*See* Order Granting in Part Gray Jay Ventures, LLC, Granby Prentice, LLC, and GR Terra LLC's Motion to Dismiss Second Amended Complaint, at 2-6 (January 28, 2022) (the "MTD Order").)

Amid the numerous claims and parties in this case, discovery has confirmed that GRMD's claims against the Lender Entities are narrow: (1) GRMD thinks that the Lender Entities should not have taken a legal position regarding the enforceability of the LPA, despite no provision of the LPA prohibiting such a thing, and (2) GRMD complains that the Lender Entities failed to observe the LPA's purchase option, despite that no one tendered the purchase price (or could have) during the eight months Gray Jay owned the property. These claims fail as a matter of law for multiple reasons.

First, Granby Prentice never took title to the Leased Premises. Under GRMD's own legal theory, Granby Prentice did not become a party to the LPA and cannot be liable for its breach.

Second, GRMD alleges that the Lender Entities breached the LPA by taking the legal position in two letters to Headwaters and one email to homeowners that the LPA had been extinguished or terminated. The problem is nothing in the LPA prohibits anyone from communicating a legal position about an interpretation of the LPA or about its continued validity.

To the extent GRMD claims that the Lender Entities breached the LPA by failing to perform the LPA's purchase option, neither Headwaters nor GRMD paid the purchase price of approximately $18 million, a key condition precedent to any sale of the Leased Premises.

Third, with no viable breach of contract claim against the Lender Entities, and given the fact the Lender Entities do not hold currently title to the Leased Premises, GRMD's claims for declaratory and injunctive relief are moot.

Fourth, the LPA was a junior encumbrance that was extinguished pursuant to C.R.S. § 38-38-501, and the LPA terminated due to Headwaters' failure to appropriate amenity fees as required by the LPA.

STATEMENT OF UNDISPUTED MATERIAL FACTS

Certain background facts can be found in the MTD Order and in the contemporaneously-filed Defendants' Headwaters Metropolitan District and GR Terra's Statement of Uncontroverted Facts in Support of Their Motions for Summary Judgment and Renewed Motion to Dismiss for Lack of Standing (Jan. 24, 2023). The following facts are necessary to decide the arguments raised herein and are undisputed.[3]

1. GRH obtained financing for the Granby Ranch development from Redwood Capital Finance Company, LLC ("Redwood"). The loan was secured by a deed of trust (the "2005 Deed of Trust") encumbering the Leased Premises and other property. The 2005 Deed of Trust was recorded with the Grand County Clerk and Recorder on June 2, 2005 at Reception No. 2005-005679. (Ex. B, 2005 Deed of Trust.)

2. On December 31, 2012, GRH as "Landlord" and Headwaters as "Tenant" entered into the Second Amended and Restated Lease Purchase Agreement (the "LPA"). (Third Amended Complaint ("Complaint") ¶ 25; Ex. C, LPA.)[4] The LPA was recorded with the Grand County Clerk and Recorder on January 3, 2020. (Compl. ¶ 34.)

3. Section 23 of the LPA sets forth the terms under which Headwaters, as Tenant, could acquire the Leased Premises. (Ex. C § 23.)

4. On April 15, 2016, Redwood assigned its rights in the 2005 Deed of Trust and associated loan to Granby Prentice pursuant to the Assignment of Deed of Trust, Assignment of

[3] The exhibits hereto are authenticated by the Declaration of Kyler K. Burgi, attached as Exhibit A.

[4] Capitalized terms not otherwise defined herein are as defined in the LPA.

Rents, Security Agreement and Fixture Filing ("Assignment of Deed of Trust"). The Assignment of Deed of Trust was recorded with the Grand County Clerk and Recorder on April 15, 2016. (Ex. D, Assignment of Deed of Trust.)

5. GRH defaulted on its obligations under the 2005 Deed of Trust. (Compl. ¶ 34.)

6. In the spring of 2020, Granby Prentice initiated a nonjudicial foreclosure proceeding under the 2005 Deed of Trust through a Notice of Election and Demand for Sale by the Public Trustee (the "NED") pursuant to C.R.S. § 38-38-101, *et seq.* and obtained an order authorizing sale. (Ex. E, NED.)[5]

7. On August 14, 2020, the Grand County Public Trustee (the "Public Trustee") held a foreclosure sale as to the Leased Premises and other property subject to the 2005 Deed of Trust. Granby Prentice submitted the highest bid at the sale and was issued the Original Public Trustee's Certificate of Purchase ("Certificate of Purchase") for the Leased Premises and other property. (Ex. F, Certificate of Purchase.)

8. On August 18, 2020, Granby Prentice assigned the Certificate of Purchase to Gray Jay.[6] The assignment was recorded with the Grand County Clerk and Recorder on August 21, 2020. (Ex. G, Assignment of Certificate of Purchase.)

9. No junior lienholder redeemed. On August 27, 2020, the Public Trustee issued a Public Trustee's Deed to Gray Jay granting it title to the Leased Premises and other property (the "Public Trustee's Deed"). The Public Trustee's Deed was recorded with the Grand County Clerk

[5] *In re Application of Granby Prentice, LLC*, Case No. 2020CV30024 (Dist. Ct., Grand Cnty., Colo.).

[6] Gray Jay at the time was called GP Granby Holdings, LLC.

and Recorder on August 31, 2020. (Ex. H, Public Trustee's Deed.)

10. Counsel for Gray Jay tendered a letter, dated September 1, 2020, to Headwaters, which asserted, among other things, that the LPA was a junior encumbrance on the Leased Premises extinguished by operation of C.R.S. § 38-38-501 (the "September 1, 2020 Letter"). (Ex. I, September 1, 2020 Letter.)

11. On or around September 2, 2020, Gray Jay sent an email to Granby Ranch homeowners taking the position that the LPA had been extinguished through the foreclosure (the "September 2, 2020 Email"). (Ex. J, September 2, 2020 Email.)

12. Counsel for Gray Jay tendered a letter, dated November 11, 2020, to Headwaters, which asserted, among other things, that, even if the LPA was not extinguished by foreclosure, the LPA was terminated in accordance with its terms (the "November 11, 2020 Letter"). (Ex. K, November 11, 2020 Letter.)

13. On May 5, 2021, Gray Jay sold and transferred the Leased Premises to GR Terra. (Compl. ¶ 47; Ex. L 499:21-500:5, Excerpts from Rule 30(b)(6) Deposition of GRMD (Lauren Kaestner).)

14. At no point between August 27, 2020 and May 5, 2021 did Headwaters attempt to exercise its option to purchase the Leased Premises under Section 23 of the LPA. (Ex. L 499:12-20.)

15. At no point between August 27, 2020 and May 5, 2021 did Headwaters tender the Purchase Price for the Leased Premises under the APA to the Lender Entities. (*Id.*)

16. Between August 27, 2020 and May 5, 2021, Headwaters and GRMD each did not have sufficient funds to pay the Purchase Price. (*Id.*; Ex. M at HWMD_8343, Headwaters' 2021

Budget; Ex. N, Resp. to Interrogatory No. 10, Plaintiff's Response to Gray Jay Ventures, LLC's First Set of Discovery Requests.)

17. GRMD filed this case in February 2020. The First, Fifth, and Sixth Claims for Relief are asserted against Gray Jay. The Third and Sixth Claims for Relief are asserted against Granby Prentice. (Compl.)

LEGAL STANDARD

Summary judgment is appropriate when "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Colo. R. Civ. P. 56(c); *see Westin Operator, LLC v. Groh*, 2015 CO 25, ¶ 19. "When the nonmoving party has the burden of proof at trial, the party moving for summary judgment need only identify those portions of the record and affidavits which demonstrate an absence of a genuine issue of material fact." *Gibbons v. Ludlow*, 2013 CO 49, ¶ 11. The burden then "shifts to the nonmoving party to show that a disputed issue of material fact exists. In making this showing, the party opposing summary judgment cannot rest on the mere allegations of the pleadings, but must demonstrate by specific facts admissible under the rules of evidence that a controversy exists." *Todd v. Hause*, 2015 COA 105, ¶ 13 (citation omitted).

ARGUMENT

Granby Prentice never took title to the Leased Premises. Gray Jay held title to the Leased Premises for approximately eight months. After nearly 24 months of litigation, GRMD cannot establish that the Lender Entities breached any provision of the LPA (to the extent they were ever parties to that agreement) or that GRMD's alleged damages were a direct result of anything the

Lender Entities did. Because Gray Jay no longer owns the property and Granby Prentice never did, GRMD's request for declaratory and injunctive relief against the Lender Entities is improper. There is no genuine dispute of fact as to these issues, and the Lender Entities are entitled to judgment as a matter of law on all of GRMD's claims.

I. Granby Prentice Was Never a Party to the LPA.

To proceed with its breach of contract claim against Granby Prentice, GRMD must establish, as a threshold matter, that Granby Prentice was a party to the LPA. *See Forest City Stapleton Inc. v. Rogers*, 2017 CO 23, ¶ 11 ("[A] person cannot acquire rights or be subject to liability arising under a contract to which he is not a party."). Granby Prentice was not a signatory to the LPA, (*see* Ex. C), nor was the LPA ever amended to add Granby Prentice as a party, (*see* Ex. L 473:12-17). GRMD attempts to overcome these facts by alleging that Granby Prentice became a party to the LPA when it took title to the Leased Premises. (Compl. ¶ 61 (alleging that Granby Prentice's predecessor agreed to be bound by the LPA and act as landlord "*if it acquired title to the Leased premises*" (emphasis added)).). That is GRMD's sole basis for alleging that Granby Prentice was a party to and bound by the LPA. (Ex. L 472:22-473:6.[7])

Granby Prentice, however, never took title to the Leased Premises and so was not a party to the LPA. When property is foreclosed on and sold at auction, the highest bidder receives a certificate of purchase. *See United Guar. Residential Ins. Co. v. Vanderlaan*, 819 P.2d 1103, 1104 (Colo. App. 1991). Then, junior lienholders have a certain period of time within which they may

[7] The testimony elicited during the Rule 30(b)(6) deposition of GRMD was, unless otherwise indicated, based upon the allegations from the Second Amended Complaint. However, the allegations as to GRMD's breach of contract claims in the Second Amended Complaint are fully incorporated into the allegations in the Third Amended Complaint. *Compare* Second Amended Complaint ("SAC") ¶¶ 48-53, 59-64 *with* Compl. ¶¶ 48-52, 62-66.

redeem the property, known as the "redemption period." C.R.S. § 38-38-302. During the redemption period, the certificate of purchase may be assigned. *Id.* § 38-38-403; *see Johnson v. Smith*, 675 P.2d 307, 309 n.1 (Colo. 1984) (noting occurrence of assignment of certificates of purchase after foreclosure sale). Actual title to the property, however, does not vest until "the expiration of all redemption periods allowed to all lienors entitled to redeem . . . or, if there are no redemption periods, upon the close of the officer's business day eight business days after the sale." C.R.S. § 38-38-501; *Telluride Resort & Spa, L.P. v. Colo. Dep't of Revenue*, 40 P.3d 1260, 1266 (Colo. 2002) ("Title to the property vests in the purchaser upon expiration of the redemption periods."). When no junior lienholder redeems, title vests in "the holder of the certificate of purchase." C.R.S. § 38-38-501.

On August 14, 2020, Granby Prentice was the successful bidder at the foreclosure sale of the Leased Premises and, on that same date, the Public Trustee issued the Certificate of Purchase to Granby Prentice. (SUMF ¶ 7; Ex. F; Compl. ¶ 35.) On August 18, 2020, Granby Prentice assigned the Certificate of Purchase to Gray Jay. (SUMF ¶ 8; Ex.G.) The assignment was recorded on August 21, 2020. (SUMF ¶ 8; Ex. G.) No lienholder redeemed, and eight business days after the foreclosure sale, on August 27, 2020, title to the Leased Premises vested in Gray Jay, the holder of the Certificate of Purchase on that date, C.R.S. § 38-38-501. (*See* SUMF ¶ 9; Ex. H at 1.) By virtue of this sequence of events, under Colorado law, Granby Prentice never took title to the Leased Premises.

In its discovery responses, GRMD asserts that the Certificate of Purchase issued to Granby Prentice gave "equitable title" in the Leased Premises. (Ex. O, Resp. Interrogatory No. 2, Plaintiff's Response to Granby Prentice, LLC's First Set of Discovery Requests.) But Granby

Prentice held the Certificate of Purchase for only four days and did not hold it on August 27, 2020, when title to the Leased Premises transferred by statute. Regardless, GRMD is incorrect as a matter of law: "[T]he holder of a certificate of purchase does not have equitable title to the property, requiring only the ministerial act of the proper officer to become a legal title." *Green v. Hoefler*, 173 P.2d 208, 209 (Colo. 1946). GRMD has advanced no valid legal or factual basis supporting its assertion that Granby Prentice was a party to the LPA.

II. Granby Prentice is Entitled to Summary Judgment Because GRMD Admits that Granby Prentice Did Not Breach the LPA.

GRMD's breach of contract claim against Granby Prentice fails for another reason. Even if Granby Prentice were a party to the LPA, GRMD now admits that Granby Prentice did not breach the LPA. (Ex. O, Resp. to Interrogatory No. 3 ("Based on discovery to date, it does not appear that Granby Prentice breached the LPA as it assigned the Certificate of Purchase to Gray Jay prior to Gray Jay acquiring the Public Trustee deed . . . .").) This uncontroverted admission alone compels summary judgment for Granby Prentice on GRMD's Third Claim for Relief.

III. GRMD's Breach of Contract Claims Fail Because the Lender Entities Did Not Breach, the Conditions Precedent Did Not Occur, and GRMD Suffered No Damages.

Even if putting aside those fatal flaws in GRMD's contract claim against Granby Prentice, and even assuming the LPA bound the Leased Premises while Gray Jay had title, GRMD cannot establish multiple elements of its breach of contract claims against the Lender Entities.

To prevail on a breach of contract claim under Colorado law, a plaintiff must prove: "(1) the existence of a contract; (2) performance by the plaintiff or some justification for nonperformance; (3) failure to perform the contract by the defendant; and (4) resulting damages

to the plaintiff." *W. Distrib. Co. v. Diodosio*, 841 P.2d 1053, 1058 (Colo. 1992) (citations omitted). Undisputed facts demonstrate GRMD cannot prove these elements as to the Lender Entities.

a. GRMD Cannot Establish That the Lender Entities Breached the LPA.

According to GRMD, the specific alleged breach of the LPA by Granby Prentice was the refusal "to act as landlord" and to "accept the purchase provisions of Section 23" of the LPA. (Compl. ¶ 51; Ex. L 480:21-481:6.) The specific alleged breach by Gray Jay is that it "assert[ed] that the LPA was terminated." (Compl. ¶ 62; Ex. L 492:13-18 (confirming that the only alleged breach by Gray Jay was "asserting that the LPA was terminated").).

The facts GRMD has provided supporting these breaches are similarly narrow. GRMD claims that the act of sending the September 1, 2020 Letter, the November 11, 2020 Letter, and the September 2, 2020 Email breached the LPA, (SUMF ¶¶ 10-12), and can identify no other action that Granby Prentice or Gray Jay took to refuse to act as landlord, to refuse to accept the purchase provisions of the LPA, or to assert that the LPA was terminated. (Ex. L 481:7-15, 482:7-10, & 484:6-21 (as to Granby Prentice); *id.* 492:13-18, 494:8-496:5, & 496:19-497:16 (as to Gray Jay); *see also* Ex. N, Resp. to Interrogatory Nos. 3 & 4 (referencing September 2, 2020 Email).)[8]

GRMD cannot point to a single provision of the LPA that prohibits the Lender Entities from simply communicating their opinion on the validity of the LPA. None exists. (Ex. L 481:16-482:6; 492:19-493:2.) The terms of the LPA do not give rise to any duty requiring parties to refrain

[8] For the first time in its January 9, 2023 discovery responses, GRMD suggested that its breach of contract claim clam is supported by the allegation that "Gray Jay's contractors displaced Headwaters' contractors in managing the amenities and thereby took possession of the amenities on our [sic] about September 1, 2020." (Ex N, Resp. to Interrogatory No. 3.) GRMD points to nothing in the LPA that prohibits the Landlord from retaining contractors to operate the Amenities to ensure the continued operation of the golf course and ski hill, and GRMD, not itself a user of the Amenities, could not have been damaged as a result.

from communicating with one another or third parties regarding their respective legal positions. *See Town of Alma v. AZCO Constr., Inc.*, 10 P.3d 1256, 1262 (Colo. 2000) (requiring plaintiff to prove that the defendant breached "a duty which arises under the provisions of a contract between the parties"). And to read into the LPA such a duty (or any contract, for that matter) would create an absurd result. If a party could breach a contract simply by asserting a position on whether the contract was in effect or not, then the mere act of interpreting any contract would give rise to a breach of contract claim. Under that logic, GRMD's communication of its own legal interpretation of the LPA in this lawsuit would be a breach of the LPA. As a matter of law, the Lender Entities' transmittal of the September 1, 2020 Letter, the November 11, 2020 Letter, and the September 2, 2020 Email did not breach the LPA.

b. The Conditions Precedent to the Lender Entities Conveying the Leased Premises Did Not Occur.

To the extent GRMD contends that the Lender Entities were required to "accept" the purchase option in Section 23 of the LPA by transferring the Leased Premises to Headwaters, GRMD's claim fails as a matter of law. "[A] condition is an event, not certain to occur, which must occur, unless its non-occurrence is excused, before performance under a contract becomes due." *See St. Paul Fire & Marine Ins. Co. v. Est. of Hunt*, 811 P.2d 432, 434 (Colo. App. 1991). None of the conditions precedent to the LPA's purchase option occurred.

Section 23 of the LPA provides that the "Tenant" may acquire the Leased Premises conditioned on payment of the "Purchase Price" or the occurrence of December 31, 2062. (Ex. § 23.) The Purchase Price is the lesser of the payment of (i) $18,949,226 (as adjusted in accordance with the LPA) or (ii) all Amenity Fees collectable by Headwaters under the subject agreements and resolutions. (*Id.*) It is not yet 2062, and the Purchase Price was never paid during the time

that Gray Jay had title to the Leased Premises. (SUMF ¶ 15.) Not only did Headwaters not pay the Purchase Price to Gray Jay, it never tendered a demand or request on the Lender Entities to transfer the Leased Premises. (SUMF ¶¶ 14-16). Headwaters' own budgets show that it had nowhere near $18 million available during 2020 and 2021. (SUMF ¶ 16; Ex.16 at HWMD_8343.) Even GRMD admits that it did not have sufficient funds to pay the Purchase Price at any time prior to the filing of this lawsuit. (SUMF ¶ 16; Ex. N, Resp. to Interrogatory No. 10.)

Because the conditions precedent to the requirement to transfer the Leased Premises never occurred, Gray Jay had no obligation to transfer the Leased Premises to Headwaters. Because Gray Jay had no such obligation, the Lender Entities did not, as GRMD alleges, refuse to "accept the purchase provisions of Section 23" of the LPA. (*See* Compl. ¶¶ 51, 62.) GRMD has no claim for breach of the LPA based upon any failure to transfer the Leased Premises.

Moreover, as this Court acknowledged, GRMD must prove that Headwaters performed under the LPA. MTD Order at 22. It is undisputed that Headwaters did not tender the Purchase Price, (SUMF ¶ 15), and GRMD has no evidence establishing that Headwaters (or GRMD for that matter) otherwise performed under the LPA during the time Gray Jay held title to the Leased Premises. GRMD's breach of contract claim fails. *See W. Distrib. Co.*, 841 P.2d at 1058.

c. GRMD Cannot Establish Any Damages Resulting from the Alleged Breaches.

Breach of contract damages are measured as the amount necessary to put plaintiff "in the position it would have occupied had the breach not occurred." *Acoustic Mktg. Research v. Technics, LLC*, 198 P.3d 96, 98 (Colo. 2008). Damages must be "traceable to and the direct result of the wrong sought to be redressed." *Husband v. Colo. Mountain Cellars*, 867 P.2d 57, 59-60 (Colo. App. 1993). Even assuming that it was a breach of the LPA to send the September 1, 2020

Letter, the November 11, 2020 Letter, and the September 2, 2020 Email, GRMD has provided no evidence that it suffered damages as a direct result of the act of sending those communications. Because the Purchase Price was never paid and the year 2062 is nearly 40 years away, the Lender Entities were not required under the LPA to transfer the Leased Premises to Headwaters (or anyone else) during the time Gray Jay owned the property. GRMD is not entitled to damages flowing from any failure to transfer the Leased Premises. Indeed, the damages that GRMD actually claims—approximately $6 million of Amenity Fees paid to GRH—have no relation to the Lender Entities' actual conduct during the eight months that Gray Jay had title to the Leased Premises. (*See* Ex. L 502:21-503:10 (admitting that $6.1 million in Amenity Fees GRMD seeks to recover was paid to GRH under the LPA, not the Lender Entities).)

IV. The Lender Entities Are Not Proper Defendants as to GRMD's Claim for Declaratory Judgment and Injunctive Relief.

GRMD's Sixth Claim for Relief seeks a declaratory judgment that the LPA is a covenant running with the land.[9] The purpose of a declaratory judgment claim is to obtain a judicial declaration of rights, status, or other legal relations under a contract. C.R.C.P. 57(b); *Associated Master Barbers v. Journeyman Barbers*, 285 P.2d 599, 601 (1955). "Absent a present conflict, a declaratory judgment claim under C.R.C.P. 57 is not justiciable." *Burkett v. Amoco Prod. Co.*, 85 P.3d 576, 579 (Colo. App. 2003). Granby Prentice never took title to the Leased Premises and is not therefore a proper defendant as to this claim. It is undisputed that Gray Jay no longer owns the Leased Premises, (SUMF ¶ 13), and was never a signatory to the LPA. Because neither Granby

[9] GRMD's Fifth Claim for Relief was originally pled in the SAC as the Eighth Claim for Relief and was dismissed by the Court. (Compl. ¶ 79.) GRMD conceded that the Fifth Claim for Relief is pled solely to preserve appellate rights and is governed by law of the case. (*Id.*) To the extent necessary, the Lender Entities incorporate by reference their prior arguments on this claim.

Prentice nor Gray Jay is a current party to the LPA even under GRMD's legal theory, they have no rights or status under the LPA to be declared, and the Lender Entities are thus not proper parties to this claim. Moreover, the extent to which the LPA is a covenant running with the land will be necessarily resolved in the context of GRMD's claims against GR Terra, the current owners of the Leased Premises. *See TBL Collectibles, Inc. v. Owners Ins. Co.*, 285 F. Supp. 3d 1170, 1196 (D. Colo. 2018) (noting that a declaratory judgment claim "serves no useful purpose where it raises issues that will necessarily be resolved in the context of other claims asserted in the same action"). This claim is thus moot as to the Lender Entities. *See Gresh v. Balink*, 148 P.3d 419, 421 (Colo. App. 2006) ("A case is moot when the relief sought, if granted, would have no practical legal effect on the controversy.").

GRMD's Sixth Claim for Relief additionally requests an injunction "enforcing the terms of the LPA as a covenant running with the land." (Compl. ¶ 86.b.) Because Granby Prentice never owned the Leased Premises, and Gray Jay no longer has title, the current or prospective injunctive relief GRMD seeks regarding the Leased Premises would be impossible for the Lender Entities to perform. *See Racine v. J--T Enters. of Am., Inc.*, 221 N.W.2d 869, 874 (Wis. 1974) ("Since those premises are no longer occupied by the defendant-corporation and are being used for another purpose, the issuance of the requested injunctions could have no 'practical effect upon an existing controversy.'"); *accord Emery v. Medal Bldg. Corp.*, 436 P.2d 661, 667 (Colo. 1968) ("Neither will equity decree specific performance against the vendor when performance is impossible."). The Sixth Claim for Relief should therefore be dismissed as to the Lender Entities.

V. The Lender Entities Join, in Part, the GR Terra Motion.

The Lender Entities are additionally or alternatively entitled to summary judgment because (a) the LPA was a junior encumbrance that was extinguished pursuant to C.R.S. § 38-38-501 and (b) the LPA terminated due to Headwaters' failure to appropriate Amenity Fees as required by the LPA. The Lender Entities join in and incorporate by reference Sections I, II and III of Defendant GR Terra's Motion for Summary Judgment on Counts IV, V and VI of the Third Amended Complaint (Jan. 25, 2023) (the "GR Terra Motion") and associated undisputed facts.[10]

CONCLUSION

For the foregoing reasons, Gray Jay and Granby Prentice respectfully request that the Court enter summary judgement in their favor on all of GRMD's claims against them.

Dated: January 25, 2023.

DAVIS GRAHAM & STUBBS LLP

/s/ Kyler Burgi
Mark Champoux, Bar No. 40480
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Attorneys for Defendants Gray Jay Ventures, LLC and Granby Prentice, LLC

[10] Pursuant to C.R.C.P. 121, § 1-15(1)(a), Granby Prentice and Gray Jay are each entitled to file a motion for summary judgment not to exceed 25 pages. This Lenders Entities' Motion, when combined with Sections I-III of the GR Terra Motion in which the Lender Entities join, does not exceed the total 50 pages collectively allotted to summary judgment motions by the two Lender Entities under Rule 121, § 1-15(1)(a).

CERTIFICATE OF SERVICE

The undersigned hereby certifies that on the 25th day of January, 2023, service of the foregoing **GRAY JAY VENTURES, LLC AND GRANBY PRENTICE, LLC'S MOTION FOR SUMMARY JUDGMENT** was effected on the following counsel of record via the Colorado Courts E-Filing System:

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