DISTRICT COURT CITY & COUNTY OF DENVER, COLORADO City and County Building, Rm. 230 1437 Bannock Street Denver, CO 80202	
Plaintiff: EBERT METROPOLITAN DISTRICT, a Colorado Special District, v. Defendant: TOWN CENTER METROPOLITAN DISTRICT, a Colorado Special District.	
Attorneys for Defendant Town Center Metropolitan District Peter C. Forbes, #14081 Kamper & Forbes, LLC 730 Seventeenth Street — Suite 700 Denver, Colorado 80202 303 893-1815 (telephone) 303 893-1829 (facsimile) pforbes@csmkf.com	Case Number: 2023CV32212 Division: 280
REPLY IN SUPPORT OF MOTION TO DISMISS	

Defendant Town Center Metropolitan District ("Town Center"), through counsel, states the following for its Reply in support of both its Motion To Dismiss and its request for fees.

OVERVIEW

Town Center seeks dismissal of all three claims asserted by Ebert. It does so based on controlling case law establishing that (1) Colorado courts cannot order specific performance of governmental contracts; (2) mandatory injunctive relief is not available to compel performance of a contract; and (3) C.R.Civ.P. 106(a)(2) does not authorize the issuance of a writ requiring a political subdivision to perform a voluntarily assumed obligation involving the exercise of discretion in implementing a multi-faceted course of conduct.

Ebert's response does not identify any contrary case law. Instead, it deliberately avoids and misstates the controlling decisions. Thus, Ebert fails to provide a basis for denying

Town Center's motion. To the contrary, Ebert's response reinforces the conclusion that C.R.S. §13-17-101 *et seq*. requires an award of fees.

ARGUMENT

A. *Thompson Creek Townhomes* Is Directly On Point And Requires Dismissal Of Ebert's Specific Performance Claim.

Thompson Creek Townhomes, LLC v. Tabernash Meadows Water and Sanitation District, 240 P.3d 554 (Colo.App. 2010), holds that under separation of powers principles Colorado courts do not have the authority to compel specific performance of governmental contracts, even where (as here) they do not involve the exercise of core governmental powers. *See id.* at 555-57. Thus, on its face, *Thompson Creek Townhomes* requires dismissal of Ebert's specific performance claim.

Nonetheless, Ebert argues that because *Ace Flying Services., Inc. v. Colo. Dep't of Agric.,* 314 P.3d 278, 280 (Colo. 1957), establishes that political subdivisions can be sued for breach of contract, and Town Center "affirmatively agreed to be sued by the plain meaning of Paragraph 6.2 of the Service Agreement," its claim for specific performance is proper. [*See* Resp.Mot.Dis., p. 6.] This argument is frivolous.

Thompson Creek Townhomes specifically ruled that *Ace Flying Services* was not controlling because, unlike a claim for damages, a claim for specific performance "implicates an *additional* concern for the separation of powers." *See* 240 P.3d at 556 (emphasis supplied). It then held that those separation of powers principles preclude ordering specific performance of a governmental contract even if — as is the case here — that contract does not involve the exercise of core governmental powers. *See id.* at 556-57. Hence, Ebert's assertion that *Ace Flying Services* is controlling deliberately ignores the portion of *Thompson Creek Townhomes* finding that the right to sue a governmental agency for breach of contract recognized in *Ace Flying*

Services is subject to the "additional concern for the separation of powers," which additional concern precludes Colorado courts from ordering specific performance of governmental contracts even when they involve the exercise of non-core powers.

Ebert also argues that *Thompson Creek Townhomes* is not controlling because Section 6.2 of the Service Agreement references specific performance as a possible remedy for breach. [*See* Resp.Mot.Dis., p. 6.] As Town Center noted in its motion, however, it is hornbook law that parties cannot, by contract, empower a court to grant relief the court does not have the authority to give. [*See* Mot.Dis., p. 9 n. 6 (citing *Colorado Comp. Ins. Auth. v. Jorgensen,* 992 P.2d 1156, 1161 (Colo. 2000) and *Clinger v. Hartshorn,* 911 P.2d 709, 710 (Colo.App. 1996)).] Thus, as a matter of law the fact that the Service Agreement identifies specific performance as a potential remedy for breach is entirely irrelevant, because that agreement cannot vest this Court with the power to order specific performance, given the holding in *Thompson Creek Townhomes* that separation of powers concerns preclude this Court from granting such relief.

Additionally, Ebert argues that *Thompson Creek Townhomes* is not controlling because, supposedly, it does even address the question of whether specific performance is available to enforce a governmental contract involving the exercise of non-core powers. Instead, according to Ebert, *Thompson Creek Townhomes* addresses the question of what relief is available against a special district for changing its policies in the absence of a written contract. [*See* Resp.Mot.Dis., pp. 6-7.]

This argument is specious. *Thompson Creek Townhomes* is not about a special district's right to change its policies. It is about whether changing those policies resulted in a breach of contract, and if so whether specific performance was an available remedy for such a breach. Thus, the opinion in *Thompson Creek Townhomes* begins by stating that the case was one

involving a "suit for breach of contract and promissory estoppel" seeking "specific performance and money damages." *See* 240 P.3d at 354. It then states that the only issue being appealed was "that part of the judgment dismissing the claim for specific performance. *Id.* at 554. And, consistent with the limited nature of the issue being appealed, the only question discussed in *Thompson Creek Townhomes* is whether separation of powers concerns prevent courts from ordering specific performance of governmental contracts involving non-core powers — which, it holds, is indeed the case. *Id.* at 555-56. Thus, there is not even a colorable good faith basis for Ebert's assertion that *Thompson Creek Townhomes* is inapposite because it supposedly addresses the question of when a special district can change its policies, not the question of when specific performance is an available remedy for breach of a governmental contract.

Finally, Ebert argues that this Court should not follow *Thompson Creek Townhomes* because in this case both parties are political subdivisions, Town Center unilaterally drafted the Service Agreement and in doing included a provision referencing specific performance as a possible remedy for breach, Colorado law favors enforcement of contracts as drafted, and failing to allow a claim for specific performance would supposedly "render the contract unenforceable as to all purposes." [*See* Resp.Mot.Dis., pp. 8-10.] This argument fails on multiple levels.

In the first place, *Thompson Creek Townhomes* is based on recognizing that separation of powers concerns limit the remedial powers of a court in cases involving the alleged breach of a governmental contract. Thus, it is the nature of the relief sought, not the identity of the parties to the suit, that creates the limitation on judicial power recognized therein, *to wit,* that courts may not order specific performance of governmental contracts even when the involve non-core powers. In the second place, even if Town Center's attorneys were the sole drafters of the

Service Agreement and provided in Section 6.2 thereof that in the event of a breach either party "may seek [. . .] specific performance," as noted above it is hornbook law that parties may not by agreement vest a court with authority it does not otherwise have. [*See supra,* p. 3.] Thus, the controlling question is not who drafted the agreement and what remedies the drafter included, but is instead whether *Thompson Creek Townhomes* holds that courts do not have the authority to grant specific performance of governmental contracts involving non-core powers — which it plainly does. And it is simply groundless for Ebert to assert that giving effect to *Thompson Creek Townhomes* would "render the [Service Agreement] unenforceable as to all purposes," because the sole effect of that decision is to limit the remedies available for breach, not to render the contract unenforceable. Thus, for this reason as well, Ebert's attempt to avoid the controlling effect of *Thompson Creek Townhomes* also fails. Accordingly, Ebert's Second Claim For Relief, requesting an order of specific performance, must be dismissed.

B. Just As The Court May Not Order Town Center To Specifically Perform Its Contract With Ebert, It May Not Issue A Mandatory Injunction Compelling Such Performance.

Ebert is not a party to the Master Declaration. It also admits that its Service Plan "does not give [it] the right to enforce the Master Declaration. [*See* Resp.Mot.Dis., p. 15.] Further, Ebert does not contest Town Center's showing that Ebert's sole right to seek enforcement of the Master Declaration is through claiming that Town Center breached its contractual obligation under the Service Agreement to enforce the Master Declaration, and that mandatory injunctive relief is not available to compel performance of a governmental contract. [*See* Mot.Dis., pp. 7-9.]

Instead, Ebert attempts to avoid that showing by contending that it has a non-contractual right to obtain a mandatory injunction compelling Town Center to enforce the Master Declaration because the "basic facts of this case demonstrate that Defendant is not performing its

obligations to the injury of Plaintiff's constituents." More particularly, Ebert contends that the Master Declaration "must be enforceable by some means" and that, because *Snyder v. Sullivan,* 705 P.2d 510 (Colo. 1985), states that issuance of a mandatory injunction involves "different considerations than decrees of specific performance," it follows that Ebert has the right to obtain a mandatory injunction to protect the rights of its supposed "constituents." [*See* Resp.Mot.Dis., p. 11.]

This argument is not only cut from whole cloth, but it is contrary to controlling Colorado law. Ebert is not some type of roving steward of the land, entitled to seek redress for alleged "injury to [its] constituents" caused by Town Center's supposed failure to enforce the Master Declaration. It is, instead, a special district with "debt obligations requiring tax revenue for the financing of infrastructure construction." [Complaint, p. 2, ¶10.] Hence, to rule that Ebert can seek mandatory injunctive relief on behalf of its constituents, based on nothing more than its *ipse dixit* that the Master Declaration "must be enforceable by some means," would be both to ignore and radically change basic Colorado jurisprudence, under which a party can only seek relief when it has suffered an injury to its own interests. *See, e.g., Ainscough v. Owens,* 90 P.3d 851, 855 (Colo. 2008) (party lacks standing unless the alleged improper action causes an injury to the party's own interests); *see also Jones v. Samora,* 2016 COA 191, ¶26, 395 P.3d 1165, 1171-72 (Colo.App. 2016) (party cannot raise rights of third-parties unless party has suffered injury-in-fact to its own interests).

Further, the reference in *Snyder* to the "different considerations" applicable to issuing injunctive relief and decreeing specific performance does not support the conclusion that Ebert has some type of non-contractual right to obtain mandatory injunctive relief on behalf of its supposed constituents. The cited portion of *Snyder* is part of the court's explanation of why it

was limiting its holding to the question of whether county courts could grant decrees of specific performance, and was reserving for another day the question of whether county courts could grant mandatory injunctions. *See Snyder,* 705 P.2d at 514 n. 5. Thus, *Snyder* in no way supports the conclusion that Ebert has the right to seek a mandatory injunction requiring Town Center to enforce the Master Declaration so that Ebert can redress alleged "injury to [its] constituents."

Or, stated differently, the only possible basis upon which Ebert could seek a mandatory injunction would be to claim that Town Center is breaching its contractual agreement to enforce the terms of the Master Declaration, as set forth in Section 5.5 of the Service Agreement, and that a mandatory injunction is appropriate to compel such performance. Ebert has, however, failed to identify any basis upon which this Court may issue a mandatory injunction compelling a party to perform a contractual obligation. Nor has Ebert provided any basis for concluding that, substantively, a request for entry of a mandatory injunction compelling performance of a governmental contract is any different than a claim seeking an order compelling specific performance of a governmental contract. Thus, as discussed in Town Center's motion, even if Colorado law recognized that a mandatory injunction is an appropriate remedy to compel performance of a contract —which is not the case — Ebert's request for a mandatory injunction compelling performance by Town Center is precisely the type of relief that, under the separation of powers principles set forth in *Thompson Creek Townhomes,* this Court lacks the authority to grant. [*See* Mot.Dis., p. 8.] Hence, Ebert's First Claim For Relief is also subject to dismissal.[1]

[1] This conclusion is not changed by the fact that Section 6.2 of the Service Agreement states in relevant part that in the event of a breach either party "may seek [. . .] temporary and/or permanent restraining orders [. . .] to compel the other to perform." Again, as noted above, controlling case law has long held that parties may not by contract vest a court with the authority to issue injunctive relief that the court does not otherwise have. *See Clinger v. Hartshorn,* 911 P.2d at 710.

C. Ebert Did Not Plead A Separate Claim For An Injunction Preventing Town Center From Disposing Of Property.

Nowhere in the body of Ebert's Complaint does it make any allegations that Town Center is about to convey any property. Nonetheless, as part of its claim for specific performance, Ebert asked that the Court issue a temporary injunction "preventing conveyance or other alienation of the subject property until the violations are corrected." [*See* Complaint, p. 9, ¶54,]

Apparently recognizing that, if its claims for specific performance and mandatory injunctive relief are dismissed, this ancillary request for injunctive relief prohibiting the disposition of property would also have to be dismissed, it appears that Ebert is now contending that its request for an injunction prohibiting Town Center from disposing of property is a separate standalone claim that the Court should allow to go forward. [*See* Resp.Mot.Dis., pp. 12-13.] If that is what Ebert is doing, its attempt to maintain this aspect of its specific performance claim must be rejected because a request for relief is not separate claim. *Cf. Berenergy Corp. v. Zab, Inc.,* 94 P.3d 1232, 1238-39 ("A prayer for relief is not considered a component of a plaintiff's claim."). Thus, if Ebert's claims for specific performance and mandatory injunctive relief are dismissed, its request for all ancillary relief associated with those claims (including an injunction against disposing of property) must also be dismissed.

Moreover, a party may not maintain a claim unless it sets forth specific facts sufficient to make out a plausible claim for relief. *See Warne v. Hall,* 2016 CO 50, ¶1, 373 P.3d 588, 589 (Colo. 2016). As noted above, there are no factual allegations in Ebert's Complaint establishing, or even implying, that Town Center is in the process of disposing, or even attempting to dispose of, any property at issue. Accordingly, the absence of such allegations

establishes that, even if this request for relief is somehow considered to be a separate claim, it must nonetheless be dismissed.

D. Ebert Has Failed To State A Claim Upon Which Relief In The Nature Of Mandamus May Be Granted.

Giving Ebert the benefit of the doubt, Town Center's motion construed Ebert's request for a writ of mandamus as a request for issuance of a writ pursuant to C.R.Civ.P. 106(a)(2). After doing so, Town Center demonstrated that the relief sought by Ebert was not available under that rule. [*See* Mot.Dis., pp. 9-12.] Ebert's initial response is to submit four documents that were not referenced in its Complaint and claim that those documents establish that it is seeking relief available under Rule 106(a)(2). [*See* Resp.Mot.Dis., pp. 14-15.]

One of those documents is the 1983 order creating Town Center as a legal entity. [*See* Resp.Mot.Dis., Ex. A.] Another is an October 2002 Resolution adopted by Town Center's Board of Directors reciting that the developer of Green Valley Ranch North had "asked [Town Center] to assume certain authorities and duties," including administration and enforcement of the Master Declaration; that Town Center's Board had determined that doing so was in the "best interests of the District"; and that accordingly Town Center agreed to amend is Service Plan to include responsibility for enforcing and administering the Master Declaration. [*See* Resp.Mot.Dis., Ex. D.]

Ebert contends that these documents establish that enforcing the Master Declaration was a "duty imposed on an official by virtue of the office held, a trust, or a statute," which is first requirement for obtaining relief under Rule 106(a)(2). [*See* Resp.Mot.Dis., p. 14.] But those documents show that enforcing the Master Declaration was a duty voluntarily *assumed* by Town Center. Thus, it was not a duty imposed on Town Center "resulting from an office, trust, or statute." Hence, the first requirement for issuing relief under Rule 106(a)(2) is absent.

Moreover, even if Town Center's agreement to assume a new duty almost 20 years after it was formed could be somehow make that duty one "resulting from an office, trust, or statute," relief under Rule 106(a)(2) is only available to "compel performance of purely ministerial duties involving no discretionary rights and no exercise of judgment." *See, e.g., Gandy v. Williams,* 2019 COA 118, ¶24, 461 P.3d 575, 583 (Colo.App. 2019). Ebert studiously avoids any discussion of how the relief it is requesting satisfies these requirements. It also studiously avoids the documents originally attached to its Complaint establishing both that Town Center has discretion when enforcing the Master Declaration, and that it in fact exercised that discretion with respect to certain of the covenants that are the subject of Ebert's claims. [*See* Mot.Dis., pp. 3-4 and 11; *see also* Complaint, pp. 5-6, ¶¶30-33 and Exhibits F and G.]

Instead, Ebert contends that it is seeking to enforce Town Center's supposed non-discretionary duty to take action that "maintains the quality, value, aesthetic nature, desirability, and attractiveness" of Green Valley Ranch North and to thereby "return the status quo to the level of quality that the Master Declaration demands." [*See* Resp.Mot.Dis., pp. 15-16.]

Accepting that contention at face value, it remains the case that the relief Ebert is seeking involves a 1,262 acre real estate development including single-family homes, multi-family homes, a golf course complex, community fencing, and common areas. [*See* Complaint, pp. 2-3, ¶¶7, 10 and 15.] The photographs attached to Ebert's Complaint show that the maintenance obligations at issue involve materially different conditions — and, according to Ebert, those photographs are only *examples* of the areas and ways in which Town Center allegedly failed properly to maintain the fencing and common areas at issue. [*See* Complaint, p. 6, ¶34 and Exhibits H, I, J, and K.]

It is therefore difficult to see how Ebert can contend in good faith that asking the

Court to order Town Center first to return to the status quo, and then to maintain, the "aesthetic nature, desirability, and attractiveness" of the community fencing and common areas in a 1,200+ acre real estate development constitutes a request to compel the performance of "purely ministerial duties involving no discretionary rights and no exercise of judgment." To the contrary, Ebert's argument establishes that it is asking the Court to order Town Center to perform (and this Court to then review Town Center's performance of) a "general course of conduct" involving a "long series of acts to be performed under varying conditions." Thus, the type of relief that Ebert is requesting is precisely the type of relief that controlling authority unambiguously holds is not available under Rule 106(a)(2). *See Rocky Mountain Animal Defense v. Colorado Division of Wildlife,* 100 P.3d 508, 517 (Colo.App. 2004) and *Ahern v. Baker,* 166 P.2d 366, 369 (Colo. 1961). Hence, Ebert's response also confirms that that the second requirement for granting relief pursuant to Rule 106(a)(2) is absent, and for this reason as well establishes that Ebert's claim for relief under Rule 106(a)(2) must be dismissed.

E. Ebert's Response Confirms That The Court Should Award Town Center Its Fees And Costs Pursuant To C.R.S. §13-17-102(2).

C.R.S. §13-17-102(5) gives a party and its attorneys the right to avoid the imposition of fees by voluntarily dismissing a claim (or claims) within a reasonable time after the attorney "knew, or reasonably should have known" that it would not prevail on such claim (or claims). Given that *Thompson Creek Townhomes* unambiguously establishes that Ebert cannot prevail on its claim for specific performance, Ebert could have (and should have) withdrawn that claim in response to Town Creek's motion. It did not do so. Instead, it advanced a series of arguments that were themselves frivolous because (1) they ignored fact that *Thompson Creek Townhomes* was based on the "additional consideration of separation of powers," (2) misrepresented the matter at issue in that case (which was manifestly the availability of specific

performance of government contracts, not the power of special districts to change their policies), and (3) disregarded controlling case law holding that parties cannot by contract vest a court with the power to grant relief the court does not otherwise have the power to grant. Thus, not only was it frivolous for Ebert initially to assert its specific performance claim in the face of *Thompson Creek Townhomes,* but its failure to withdraw that claim and to instead proffer a series of frivolous arguments in defense of its failure to do so is precisely the type of vexatious conduct mandating an award of fees under C.R.S. §13-17-102(2).

With respect to Ebert's claim for relief in the nature of mandamus under Rule 106(a)(2), such relief is only available to enforce an official duty, *i.e.,* a duty stemming from an "office, trust, or station." Here, the additional documents submitted by Ebert establish that the obligation to enforce the terms of the Master Declaration did not stem from any official duty. Instead, that duty was one Town Center voluntarily assumed at the request of the developer of Green Valley Ranch North. Thus, Ebert knowingly sought relief under Rule 106(a)(2) that did not involve the performance of a duty stemming from an "office, trust, or station." By definition, doing so was frivolous.

Moreover, Ebert's response establishes that it is not seeking to compel the performance of a discrete non-discretionary ministerial duty. Instead, it was seeking to "enforce duties generally, or to control and regulate a general course of official conduct for a long series of acts to be performed under varying conditions" — which is precisely the type of relief that controlling case law holds is not available under Rule 106(a)(2). *See Gandy, Rocky Mountain Animal Defense,* and *Ahern, supra.* Accordingly, for this reason as well, Ebert's pursuit of its claim under Rule 106(a)(2) was frivolous. And, because Ebert did not take the opportunity to

dismiss this claim pursuant to C.R.S. §13-17-102(5) after being confronted with that controlling case law, was also vexatious.

Finally, Town Center's motion established that the only basis upon which Ebert could seek injunctive relief to require Town Center to enforce the Master Declaration was under the Service Agreement, and there is no Colorado authority supporting the proposition that a mandatory injunction will lie to compel enforcement of a contract. Ebert did not contest that showing. Thus, it should have dismissed its claim for injunctive relief on the basis it was seeking relief that this Court could not grant. But it did not do so. Instead, it claimed it had a non-contractual right to seek injunctive relief to prevent injury to its supposed "constituents." Moreover, it did so in direct violation of controlling Colorado precedent holding that, even in the limited circumstances where a party can raise the rights of third parties, it can only do so where the party itself has suffered injury from the complained-of conduct — which Ebert does not claim to be the case here. Thus, by failing to withdraw its claim for mandatory injunctive relief when it knew such relief was not available, and by instead attempting to invent a new basis for seeking injunctive relief that was itself contrary to established Colorado case law, Ebert's continued pursuit of its claim for mandatory injunctive relief was both frivolous and vexatious, mandating an award of fees with respect to this claim as well.

Stated differently, on one side of the line, there must certainly be room for counsel to engage in vigorous advocacy, including making good faith attempts to distinguish prior appellate decisions. Conversely, on the other side of the line, it is the duty of counsel to follow controlling case law when it is directly on point and there is no good faith basis for arguing that such controlling precedent can be distinguished. Ebert crossed that line here by ignoring and misstating the holding and issue being addressed in *Thompson Creek Townhomes,* by claiming

that parties can contractually give a court the authority to grant relief the court otherwise lacks the power to grant, by seeking relief under Rule 106(a)(2) that the controlling decisions uniformly hold is not available under that rule, and by attempting to manufacture a right to seek injunctive relief on behalf of its "constituents" in direct violation of Colorado case law identifying the limited circumstances in which a party can seek relief on behalf of third parties not before the Court.

Thus, this is one of those rare cases in which the arguments of opposing counsel cannot be justified on the basis that they involve a good faith attempt to distinguish existing authority or establish a new theory of law. Accordingly, this is one of those rare cases where C.R.S. §13-17-102(2) mandates an award of fees and costs.

CONCLUSION

Town Center disagrees with Ebert's assertion that Town Center has breached any of its obligations. But even accepting Ebert's allegations as true, for the reasons stated above and in its Motion To Dismiss, Town Center submits that Ebert's claims for specific performance, mandatory injunction, and relief under Rule 106(a)(2) must be dismissed under either Rule 12(b)(1) because they seek relief this Court is not authorized to grant or under Rule 12(b)(5) because Ebert's allegations do not state claims upon which relief may be granted.

Dated: September 29, 2023
Denver, Colorado

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on September 29, 2023, a copy of the foregoing was served via Colorado Courts Efiling system on the following:

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