

Exhibit B

To

Motion To Dismiss

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CASE NUMBER: 2023CV32212

Diane Wziontka

From: Peter C. Forbes
Sent: Wednesday, August 30, 2023 7:03 AM
To: Evan Ela; Harley Gifford
Subject: RE: Proposed Motion To Dismiss

My apologies – this was inadvertently sent before being finished. I have completed the message in red below, and also corrected a few typos in the partial message you received. So this is the operative message.

Thanks, and sorry for any confusion.

Peter

From: Peter C. Forbes
Sent: Wednesday, August 30, 2023 6:44 AM
To: Evan Ela <eela@cegrlaw.com>; Harley Gifford <hgifford@cegrlaw.com>
Subject: Proposed Motion To Dismiss

Evan and Harley – as you know, my client intends to file a motion to dismiss.

I believe we discussed the grounds upon which I will seek dismissal of the First and Second Claims for Relief during our conference call a few weeks ago, but to the extent there is any ambiguity, the *Thompson Creek Townhomes* case I sent you directly holds that claims for specific performance of governmental contracts are not available under Colorado law. As your Complaint acknowledges in paragraph 44, your mandatory injunction claim is substantively identical to the specific performance claim.

Given that C.A.R. 35(a) makes *Thompson Creek Townhomes* binding on district courts, I do not see any good faith basis for your continuing to pursue those claims. I also don't see any good faith basis for the failure of your motion to discuss and provide some argument as to why *Thompson Creek Townhomes* is not controlling. Therefore, at this point, unless you agree to dismiss those claims sby Friday (or provide me with some authority establishing that such claims are proper in light of *Thompson Creek Townhomes*), I intend to move for dismissal of that claim, and to seek recovery of fees because, under the case law interpreting C.R.S. 13-17-101, *et seq.* the failure to withdraw a claim when there is no good faith legal basis for asserting the same is substantially frivolous – and, given that I have specifically brought the controlling case law to your attention and you have not withdrawn that claim, substantially vexatious.

With respect to your remaining claim, for at least 70 years Colorado's courts have recognized that, per the express language of Rule 106(a), Colorado district courts can no longer issue writs of mandamus. *See generally Hall v. City and County of Denver*, 190 P.2d 122, 125 (Colo. 1948). Per Rule 106(a)(2), relief in the nature of mandamus (which I assume is what you are seeking) does not lie to compel enforcement of a contract, because such relief is only available to enforce an official duty. Finally, controlling case law directly holds that relief in the nature of mandamus is not available 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,” particularly where discretionary decisions will be required in connection with implementing such a course of conduct. *See Rocky Mountain Animal Defense v. Colorado Division of Wildlife*, 100 P.3d 508, 517 (Colo.App. 2004), quoting *Ahern v. Baker*, 166 P.2d 366, 369 (Colo. 1961). That however, is precisely the type of relief you are seeking.

Again, then, I don't see any good faith basis for your request that the Court issue a writ of mandamus, even assuming the Court had the authority to issue such a writ, which it does not. Accordingly, again, unless you agree to dismiss that claim

by Friday (or are able to provide me with some authority establishing that Colorado district courts have the authority to issue writs of mandamus to enforce contracts, particularly when the subject of the claim seeks to enforce contractual duties generally and the requested relief would require the performance of a long series of acts under varying conditions), I intend to move for dismissal of that claim on the basis of the foregoing authorities, and to also seek recovery of fees with respect to the continued pursuit of that claim because, under the case law interpreting C.R.S. 13-17-101, *et seq.* the failure to withdraw a claim when there is no good faith legal basis for asserting the same is substantially frivolous – and, given that I have specifically brought the controlling case law to your attention and you have not withdrawn that claim, substantially vexatious.

I remain open to discuss these issues at your convenience between now and Friday.

Thanks. Peter

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