DISTRICT COURT, JEFFERSON COUNTY, COLORADO 100 Jefferson County Parkway Golden, CO 80401	
Plaintiff: SOLTERRA LLC, a Colorado Limited Liability Company **v.** **Defendants:** FOSSIL RIDGE METROPOLITAN DISTRICT NO. 1, a quasi-municipal corporation and political subdivision of the State of Colorado; FOSSIL RIDGE METROPOLITAN DISTRICT NO. 2, a quasi-municipal corporation and political subdivision of the State of Colorado; and FOSSIL RIDGE METROPOLITAN DISTRICT NO. 3, a quasi-municipal corporation and political subdivision of the State of Colorado.	▲ COURT USE ONLY ▲ Case No.: 2022CV31409 Division: 1 Courtroom: 540
Attorneys for Defendants Fossil Ridge Metropolitan District Nos. 1-3: Kelley B. Duke, #35168 Benjamin J. Larson, #42540 IRELAND STAPLETON PRYOR & PASCOE, PC 717 17th Street, Suite 2800 Denver, Colorado 80202 Telephone: (303) 623-2700 Fax No.: (303) 623-2062 E-mail: kduke@irelandstapleton.com blarson@irelandstapleton.com	

DEFENDANT FOSSIL RIDGE METROPOLITAN DISTRICT NOS. 2 AND 3'S MOTION TO DISMISS PURSUANT TO C.R.C.P. 12(b)(5)

Defendants Fossil Ridge Metropolitan District Nos. 2 and 3 (the "Financing Districts") by and through their undersigned counsel, IRELAND STAPLETON PRYOR & PASCOE, PC, file this

Motion to Dismiss Plaintiff's First Amended Complaint Pursuant to C.R.C.P. 12(b)(5) ("Motion"), stating as follows:

Certificate of Conferral: After conferral, Plaintiff Solterra LLC ("Brookfield")[1] indicated it opposes this Motion. The Financing Districts also conferred on a motion for page limit extension to file a combined motion on behalf of both the Financing Districts and Fossil Ridge Metropolitan District No. 1 (the "Service District", with the Financing Districts, the "Districts"), which Brookfield opposed. Consequently, the Districts are filing separate motions. The Service Districts' Motion provides the Court with the factual background of this dispute (Statement of Facts, pp. 3-9), which is incorporated herein by reference.

INTRODUCTION

In 2006, Brookfield's predecessor organized the Districts to take advantage of a taxpayer-funded local government financing mechanism for the development of the Solterra community. By utilizing the local government structure, Brookfield was able to use taxing authority and associated property tax revenue streams to pay for Brookfield's development costs. For the first decade of the Solterra development, Brookfield had total control of the Boards of Directors for the Districts (the "Boards") because Brookfield owned all the property in the postage-stamp sized "master" Service District and all of the Directors on each of the Boards were Brookfield representatives. *See* Nov. 13, 2017 Order Re: Appointment Motions, Case No. 05CV3044 ("Appointment Order"), at 1-2. As a result, the developer represented both sides in drafting and executing the controlling agreements at issue in this case.

[1]Solterra LLC is the developer and commonly known by its parent company, Brookfield Residential (Colorado) LLC. "Brookfield" is used to avoid confusion with the Solterra community.

In 2017, Brookfield lost control of the Districts by inexplicably causing all its representatives to resign from the District Boards. *See* Appointment Order at 2. This left the Service District in complete limbo because, as part of the developer-controlled financing strategy to own all property in the Service District, there were no other eligible electors to sit on its Board. *Id.* Brookfield then sought to have its handpicked receiver appointed to control the Service District in perpetuity. *Id.* at 3-5. That gambit failed when this Court appointed three residents of Solterra to serve on the Board of the Service District until its boundaries could be expanded to include other residents of the community and an election could be held to fill the vacant Director seats on the Board for each of the Districts. *Id.* at 5-8. The result was that Brookfield was forced to give up control of the Districts to independently elected resident-Boards. Brookfield's loss of control of those Boards has caused years of strife between the Districts and Brookfield.

Because Brookfield no longer directly controls the Districts, it has pivoted to threats and intimidation in an effort to indirectly control them. This lawsuit is the culmination of those efforts. The crux of Brookfield's First Amended Complaint ("FAC") is that the Financing Districts—which are independent local governments and have no contractual repayment obligation to Brookfield—should be ordered by this Court to immediately issue tax-based bonds to the Districts' maximum debt limit, all so the Service District can repay allegedly eligible developer costs on Brookfield's expedited timetable.

However, under the Reimbursement Agreement (as defined below), the Service District is only contractually obligated to reimburse Brookfield from bond proceeds, ***if any***, received from the Financing Districts, which the Service District has indisputably done. In turn, the Master IGA (as defined below) governing the relationship between the Districts (to which Brookfield is not a

party) provides that the Financing Districts—as the local governments providing the tax revenue to support the issuance of bonds—are charged with determining both the amount and timing for issuing such bonds. Thus, on the face of the governing documents, ***Brookfield cannot dictate when the Financing Districts must bond***. Consequently, the Service District is not in breach of any repayment obligation to Brookfield. Moreover, correspondence referenced in the FAC demonstrates that the Districts have never "refused" to repay any remaining unpaid developer costs when the timing is appropriate, so long as the alleged costs are eligible for reimbursement and properly documented.

Rather, the Districts have already issued over $38 million in reimbursement bonds ***for a development that is not even finished***, with the latest round of bonding just issued in 2020, which resulted in Brookfield receiving almost $10 million in bond proceeds. According to Brookfield's own Financial Plan attached to the Service Plan (as defined below), the Districts are not projected to issue more bonds until 2025, with the final bond issuance in 2032. Consequently, Brookfield's conclusory allegation that current assessed property value in the Districts is sufficient to support immediate bonding to the debt limit is contradicted by the face of the Service Plan and should not be accepted as true at the motion to dismiss stage.

In short, Brookfield cannot take advantage of public tax dollars through a series of developer-drafted agreements and then ignore the plain terms of those agreements to suit Brookfield's interests. As set forth below, the Court should hold Brookfield to the terms of the agreements it put in place and dismiss (a) Claim 1 for breach of the Reimbursement Agreement against the Service District; (b) Claim 2 for an order requiring the Financing Districts to bond now and for the Service District to "cooperate and coordinate" that bonding; (c) Claim 4 for

breach of the covenant of good faith and fair dealing against the Service District as it relates to the alleged failure to repay Brookfield; (d) Claim 5 for unjust enrichment against the Financing Districts; and (e) Claim 6 for promissory estoppel against the Financing Districts.

NEW ALLEGATIONS IN THE FAC

In response to the Districts' Motion to Dismiss the initial Complaint, Brookfield filed its FAC (*see* compare version attached at **Exhibit 1**). The FAC continues to assert the same claims as the first Complaint but adds dozens of new allegations in an attempt to distract the Court from the operative language in the governing documents. More telling than all the FAC's new allegations is what it continues to omit. Despite suing the Service District for breach of its alleged repayment obligations, the FAC fails to mention the essential "Terms of Repayment" provision in the Reimbursement Agreement because the express terms of that provision undercut Brookfield's breach claim. Likewise, the FAC omits any mention of the provisions in the Service Plan and Master IGA (drafted by the developer), that give the Financing Districts sole discretion to determine if and when to issue repayment bonds. Perplexingly, Brookfield continues to act as if these operative provisions do not exist even after the first Motion to Dismiss brought them front and center where they belong. Consequently, the FAC does nothing to eliminate the incurable deficiencies with Brookfield's repayment claims.

STATEMENT OF FACTS

The Financing Districts incorporate the Statement of Facts section in the Service District's Motion at pages 3-9.

MOTION TO DISMISS STANDARDS

The purpose of a motion to dismiss under Rule 12(b)(5) is "to test the formal sufficiency of the complaint." *Dorman v. Petrol Aspen, Inc.*, 914 P.2d 909, 911 (Colo. 1996). In resolving motions to dismiss for failure to state a claim, Colorado has adopted "the plausibility standard." *See Warne v. Hall*, 373 P.3d 588, 595 (Colo. 2016). Thus, "only a complaint that states a plausible claim for relief survives a motion to dismiss." *Id.* at 591. As the Supreme Court of the United States explained, a "formulaic recitation of elements of a cause of action will not do." *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555 (2007).

While the Court reviews factual allegations in the light most favorable to the nonmoving party, the Court does not "accept as true legal conclusions that are couched as factual allegations." *Fry v. Lee*, 2013 COA 100, ¶ 17. Dismissal is proper when the "factual allegations in the complaint cannot, as a matter of law, support the claim for relief." *Colo. Ethics Watch v. Senate Majority Fund, LLC*, 269 P.3d 1248, 1253 (Colo. 2012). Further, documents attached to or referenced in a complaint can be considered on motion to dismiss without converting to a summary judgment motion. *Peña v. Am. Family Mut. Ins. Co.*, 2018 COA 56, ¶¶ 14-15; *Yadon v. Lowry*, 126 P.3d 332, 336 (Colo. App. 2005).

ARGUMENT

I. Claim 5 Against the Financing Districts Should Be Dismissed Because an Alleged Breach of Contract by the Service District Cannot Form the Basis of an Unjust Enrichment Claim Against the Financing Districts.

Brookfield asserts that the Financing Districts were unjustly enriched because the Service District allegedly breached its contractual obligation to reimburse Brookfield and to timely accept public infrastructure. FAC ¶¶ 151, 154, 155. In addition to the defect with the alleged underlying

breach claim against the Service District (*see* Service District Motion at Argument § I, pp. 10-14, incorporated by reference), Claim 5 fails because the Service District's alleged breach cannot support an unjust enrichment claim ***against the non-contracting Financing Districts***.

Under Colorado law, "[i]f the party conferring the benefit [Brookfield] does so pursuant to a contract with a third party [the Service District], then non-performance by the other party to the contract does not entitle the party conferring the benefit to repayment from the recipient [the Financing Districts]." *Stokes v. Int'l Media Sys., Inc*., 686 P.2d 1368, 1370 (Colo. App. 1984) (citing Restatement of Restitution § 110 (1937)); *see also Liberty Savings Bank, FSB v. Webb Crane Serv., Inc.*, 2005 WL 1799300, *11 (D. Colo. Jul. 27, 2005) (holding that plaintiff's unjust enrichment claim failed on same grounds). While Colorado has carved out certain limited exceptions to this longstanding rule where the benefiting party is a property owner, those exceptions do not apply where Brookfield does not—and cannot—allege that the Financing Districts own any allegedly improved property. *Redd Iron, Inc. v. Int'l Sales & Servs. Corp.*, 200 P.3d 1133, 1139 (Colo. App. 2008) (discussing exception where non-contracting party is a benefiting property owner such as a landlord or homeowner).

Accordingly, Brookfield's remedy, if any, is against the Service District in contract and the unjust enrichment claim against the Financing Districts fails as a matter of law.

II. Claim 6 for Promissory Estoppel Against the Financing Districts Should Be Dismissed Because the Master IGA Expressly Precludes Third-Party Beneficiaries Such as Brookfield.

"Promissory estoppel is a quasi-contractual cause of action that, under certain circumstances, provides a remedy for a party who relied on a promise made by another party, ***even though the promise was not contained in an enforceable contract***." *Pinnacol Assurance*

v. Hoff, 2016 CO 53, ¶ 32 (emphasis added). Here, the alleged promise Brookfield is trying to enforce, i.e., the Financing Districts' promise to issue debt to repay Brookfield (FAC ¶ 158), is contained squarely within an enforceable contract—the Master IGA. Thus, while couched as a promissory estoppel claim, Brookfield is, in fact, attempting to enforce the Financing Districts' purported obligations under the Master IGA, a contract to which Brookfield is not a party. Accordingly, Claim 6 is, in effect, a third-party beneficiary breach of contract claim disguised as a promissory estoppel claim. *Cassidy v. Millers Cas. Ins. Co. of Texas*, 1 F. Supp. 2d 1200, 1209 (D. Colo. 1998) (applying Colorado law) (holding that "[a] third-party who is not a signatory to an agreement may enforce one or more of the obligations created by that agreement, but only if the other parties intend the third-party to be a direct beneficiary of one or more obligations of that agreement") (citing *Villa Sierra Condominium Ass'n v. Field Corp*., 878 P.2d 161, 166 (Colo. App. 1994)).

Brookfield cannot enforce the Financing Districts' alleged contractual promises to the Service District because the Master IGA repeatedly and unequivocally states there are ***no third-party beneficiaries to the Master IGA***. FAC, Ex. B, pp. 5-6, § I.1.3(d), (e) & (j); p. 17, § III.3.8; p. 41, § X.10.14 (highlighted copy attached as **Exhibit 2**). Where a contract contains an express no-third-party-beneficiary ("NTPB") provision, the contracting parties intend to "preclude recognition of third party beneficiaries," and therefore third-party claims seeking to enforce the contract's terms fail as a matter of law. *Gorsuch, Ltd., B.C. v. Wells Fargo Nat. Bank Ass'n,* 771 F.3d 1230, 1238 (10th Cir. 2014) (applying Colorado law) (dismissing third-party claim seeking to enforce contract terms because the contract contained a NTPB provision).

This conclusion does not change merely because Brookfield couches its claim as one for promissory estoppel rather than the enforcement of an express contract. *See, e.g.*, *In re U.S. W., Inc. Sec. Litig.*, 65 Fed. Appx. 856, 864–65 (3rd Cir. 2003) (upholding dismissal of plaintiffs' promissory estoppel claim seeking to enforce promises made in an express contract to which plaintiffs were not a party). In *In re: U.S. West*, the court reasoned that dismissal of the promissory estoppel claim was proper for several reasons, including because plaintiffs could not establish the requisite element of reasonable reliance given that the contract in question had a NTPB provision. *See id.*; *Berg v. State Bd. of Agric.*, 919 P.2d 254, 259 (Colo. 1996) (reciting elements of claim). In drafting the Master IGA, the developer went to great lengths to expressly preclude third-party beneficiaries. The fact that Brookfield now regrets how its predecessor drafted the Master IGA does not relieve Brookfield of the consequences of its own language.

In an attempt to plead around this fact, Brookfield has come up with new allegations in its FAC. Brookfield initially (and correctly) pled that the Financing Districts' repayment promises are memorialized in the Master IGA. *See* Ex. 1, Compl. Compare ¶¶ 30, 45. The Service Plan, the Reimbursement Agreement, and the Master IGA all recognize that the Financing Districts' repayment obligations are governed by the Master IGA.[2] But because Brookfield failed to appreciate the significance of the Master IGA's NTPB clause, Brookfield now alleges that it relied

[2] FAC, Ex. A at § IV.A, p. 16 ("The Master IGA shall set forth the specifics of the relationship between the Service District and the Financing Districts, including the means for . . . financing . . . the . . . improvements needed to serve the Project.") (highlighted copy attached as **Exhibit 3**); *see also* FAC, Ex. C at "WHEREAS" clause pp. 1-2 (highlighted copy attached as **Exhibit 4**); Ex. 2, Master IGA, p. 4, § I.3.a (providing that the Service Plan "describes the nature of the relationship between the Districts and contemplates that [the Master IGA] would be executed by the Districts to effectuate that relationship").

on promises made by the Financing Districts' outside of the Master IGA, such as unidentified oral promises and promises in the Service Plan. FAC ¶ 159. The problem with this new theory is that the developer prepared all the governing documents—including the Service Plan and the Master IGA—and thus Brookfield was fully aware that the Master IGA governs the Financing Districts' bonding promises and precludes Brookfield from relying on those promises. Consequently, Brookfield's newfound reliance on the same promises purportedly made elsewhere cannot be reasonable as a matter of law. *See In re U.S. W., Inc. Sec. Litig.*, 65 Fed. Appx. at 864–65.

Finally, even if Brookfield could legally enforce the Financing Districts' alleged promises in the Master IGA (or anywhere else), Brookfield fails to plausibly plead that the Financing Districts have breached a promise by not bonding on Brookfield's timeline. *Berg*, 919 P.2d at 259 (providing that promissory estoppel claim is "a distinct contract claim" used to enforce ***unkept*** promises). As discussed in Section I.A, *supra*, the Financing Districts have sole discretion under the Master IGA to determine if and when to bond. This is an independent basis for dismissing Claim 6.

CONCLUSION

The FAC continues to distort the governing agreements by disregarding their essential provisions. It continues to mischaracterize the parties' communications leading up to this lawsuit. And new to the FAC are baseless allegations regarding the Financing Districts' purported bonding capacity which form the lynchpin of Brookfield's repayment claims but are directly contradicted by the Service Plan. *See* Service District Motion, SoF ¶¶ 19-21. Brookfield has no right—whether through contract or equity—to unilaterally force the repayment of alleged developer costs ten years

ahead of schedule and on financing terms that would violate the Service Plan. Brookfield should not be allowed to bully the Financing Districts into doing so through this lawsuit. Consequently, the Financing Districts respectfully request that Claim 5 for Unjust Enrichment and Claim 6 for Promissory Estoppel be dismissed with prejudice pursuant to C.R.C.P. 12(b)(5) as set forth above.

Respectfully submitted this 8th day of March, 2023.

IRELAND STAPLETON PRYOR & PASCOE, PC

/s/ Kelley B. Duke
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Attorneys for the Districts

CERTIFICATE OF SERVICE

I hereby certify that on this 8th day of March, 2023, a true and correct copy of the foregoing **DEFENDANTS' FOSSIL RIDGE METROPOLITAN DISTRICT NOS. 2 AND 3'S MOTION TO DISMISS PURSUANT TO C.R.C.P. 12(b)(5)** was filed and served via CCEF on all counsel of record.

/s/ Dawn A. Brazier
Dawn A. Brazier