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	

DEFENDANTS' PARTIAL MOTION TO DISMISS PURSUANT TO C.R.C.P. 12(b)(5)

Defendants Fossil Ridge Metropolitan District No. 1 (the "Service District"), Fossil Ridge Metropolitan District No. 2 ("District 2"), and Fossil Ridge Metropolitan District No. 3 ("District 3", and with District 2, the "Financing Districts") (collectively, the "Districts") by and through

their undersigned counsel, IRELAND STAPLETON PRYOR & PASCOE, PC, file this Partial Motion to Dismiss Pursuant to C.R.C.P. 12(b)(5) ("Motion"), stating as follows:

CERTIFICATION OF COMPLIANCE WITH C.R.C.P. 121 § 1-15(8)

Undersigned counsel for the Districts conferred in good faith with counsel for Plaintiff Solterra LLC ("Brookfield")[1] regarding this Motion, which Brookfield opposes.

INTRODUCTION

In 2006, Brookfield's predecessor organized the Districts to take advantage of the 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 1.1-acre "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, Brookfield represented both sides in drafting and executing the controlling agreements at issue in this case.

However, in 2017, Brookfield inexplicably caused all its representatives to resign from the 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 postage-stamp Service District, there were no other eligible electors to sit on its Board. *Id.* Brookfield then

[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.

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 Complaint 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 pay Brookfield reimbursement 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 Complaint 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 financing 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.

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 declaratory relief that the Service District is obligated to cause the Financing Districts to bond now; (c) Claim 4 for breach of the covenant of good faith and fair dealing against the Service District; (d) Claim 5 for unjust enrichment against the Financing Districts; and (e) Claim 6 for promissory estoppel against the Financing Districts.

FACTUAL BACKGROUND

A. The Controlling Documents Give the Financing Districts Sole Discretion to Determine If and When to Issue General Obligation Bonds for the Service District to Repay Properly Documented Eligible Costs.

The Service Plan

1. The Districts are governed by the August 27, 2007 Second Amended and Restated Service Plan (the "Service Plan"). Compl., Ex. A. Carma, LLC, Brookfield's predecessor, prepared and submitted the Service Plan for approval by the City of Lakewood ("City") as part of the organization of these three local governments to fund certain parts of Brookfield's development of Solterra. *Id.* at 24. However, Brookfield is not a party to the Service Plan. *See Id.* at 1 at preamble.

2. The Service Plan set the limit for "General Obligation Debt" (the type of debt at issue in the Complaint) at $70,000,000. Compl. ¶ 18; Compl. Ex. A, p. 5 (defining the General Obligation Debt Limitation as the "maximum amount" that the Districts "***may*** issue in aggregate") (emphasis added). General Obligation Debt generally refers to bonds that are repaid through property taxes and which can be used to fund only the limited scope of "Public Improvements" identified in Exhibit B of the Service Plan. Compl., Ex. A, p. 5 (definition of the term).

3. Under the Service Plan, local control of government functions, including the critical decision-making authority to issue tax-based bonds, remains with the Districts in order to serve the best interests of the residents and property owners of Solterra, not Brookfield. *Id.* a § I.C.2.c ("The combination of appropriate management and ***control of the timing of financing***, and the ability of the Districts to obtain tax-exempt interest rates will benefit residents and property owners.")

4. This example is just one of many instances—***all of which Brookfield ignores in its Complaint***—where the Service Plan makes clear that the Districts are charged with determining when to issue tax-based General Obligation Debt.

5. For instance, Section V(A) of the Service Plan, titled "Financial Plan", provides: "All Debt of the Districts shall be permitted to be issued ***on a schedule and in such year or years as the Districts determine shall meet the needs of the of the Financial Plan and phased to serve development as it occurs***." Compl., Ex. A, p. 18, § 5.A (emphasis added). That "Financial Plan", which is attached as Exhibit D to the Service Plan, is summarized as "issu[ing] an amount of Debt as the Districts can reasonably pay within the parameters of [the Service Plan]". *Id.*

The Master IGA

6. As part of their organization, Brookfield's predecessor caused the Districts to enter into a Master Intergovernmental District Facilities and Construction Agreement dated January 8, 2008 (the "Master IGA"), which governs the relationships between the Districts and provides the "means for approving, ***financing***, constructing, operating and maintaining the public services and improvements needed to serve the Project." Compl., Ex. A, p. 16, § AV.A (emphasis added). The Master IGA was prepared by Brookfield's predecessor and consented to by the City. *See id.*

7. Generally, the Master IGA sets forth the relationship between the Districts, with the Service District "responsible for managing the financing, construction, operating and maintenance of the 'Facilities,'" and the Financing Districts responsible for issuing General Obligation Debt to repay eligible development costs "in a manner consistent with the Service Plan." Compl., Ex. C, pp. 4-5, §§ 1.3.b, 1.3.e.

8. Brookfield is not a party to the Master IGA it caused the Districts to enter into, and the Master IGA provides there are no third-party beneficiaries to the agreement. Compl., Ex. C, § I.1.3(d), (e) & (j), pp. 5-6; § III.3.8, p. 16; § X.10.14, p. 41.

9. Article IV of the Master IGA concerning "Financing of the Facilities" provides that the ***Financing Districts***, as the Districts providing the tax base, "shall retain the discretion and authority to provide for and raise [funds for "Capital Costs"] in any manner lawfully available to the Financing District[s]," including the issuance of General Obligation Debt, "***as the Financing District[s] shall in [their] sole discretion determine*** to issue or incur." Compl., Ex. C, p. 20, § 4.4.c (emphasis added).

10. The Master IGA further provides that the Financing Districts "shall not be deemed to have surrendered or delegated ***any powers with respect to the determination of the manner in which the financial obligations imposed by this Agreement are to be satisfied and otherwise discharged***." Compl., Ex. C, p. 20, § 4.4.c (emphasis added).

The Reimbursement Agreement

11. The only contract at issue to which Brookfield is a party is the Reimbursement Agreement, which is between Brookfield and the Service District. Compl., Ex. B, p. 1 at preamble. ***The Financing Districts are not parties to the Reimbursement Agreement.***

12. The Reimbursement Agreement makes clear that the Service District's reimbursement obligations are subject to the provisions of both the Service Plan and the Master IGA. Compl., Ex. B, at "Whereas" clause on pp. 1-2; p. 5, § 5.

13. Specifically, the Service District's reimbursement of Brookfield is contingent on the ***Financing Districts*** issuing General Obligation Bonds "at such time as it is reasonably

feasible to do so, ***subject to the limitations of the Service Plan and the electoral authority of [the Financing Districts]***." Compl., Ex. B, at "Whereas" clause on pp. 1-2; p. 5, § 5; *see also id.* at 3, § 1 (providing that the Service District agrees to reimburse Brookfield for certain "District Eligible Costs," but only "***from the payment sources set forth herein***.") (emphasis added).

14. Further, with respect to "Terms of Repayment," the Reimbursement Agreement restricts the Service District to "repay[ing] any Repayment Obligations due hereunder ***solely from the proceeds of Bonds***, if any, provided to the [Service] District [by the Financing Districts] pursuant to the terms of the Master IGA." Compl., Ex. B, p. 5, § 5. Brookfield admits that the Service District agreed to repay Brookfield only from bonds issued by the Financing Districts, if any. Compl. ¶ 33.

15. Consequently, the Service District has no say under the Reimbursement Agreement as to if, when, or how Brookfield is repaid because repayment comes from bonds issued by the Financing Districts, which have sole discretion under the Master IGA to determine whether and when to do so. *See* Statement of Facts ("SoF") ¶¶ 14-15, *supra*. ***Importantly, the Reimbursement Agreement, which sets forth the only contract rights Brookfield has for reimbursement, provides no deadlines for the Service District to reimburse Brookfield***. *See generally,* Compl., Ex. C.

B. Brookfield Has Yet to Complete Development; Nevertheless, the Financing Districts Are on Schedule with the Projected Bond Timeline Set Forth in the Service Plan.

16. The Financial Plan (also referred to as the Financing Plan) attached to the Service Plan outlines the timeline for completion of development and possible issuance of debt by the Financing Districts to reimburse eligible developer costs. Compl., Ex. A at Exhibit D thereto.

The Financing Plan was prepared for Brookfield's predecessor by a municipal bond firm. *Id.* at p. i.

17. The Financing Plan Brookfield drafted projected that the development of Solterra would be completed by 2017. *Id.* at Schedule 1. Brookfield admits in its Complaint that, at this time, development is not expected to be completed until 2026. Compl. ¶ 24.

18. The Financial Plan models the issuance of General Obligation Debt in the total amount of $64.15 million by the Financing Districts in phases through 2032. *See* Compl. Ex. A at Exhibit D thereto, p. ii.

19. Despite development not being completed, the Financing Districts are effectively on schedule with bond issuances, with $38,130,000 in bonds having been issued to date. Compl. ¶ 36. The most recent bond issuance was projected to occur in 2020 for $8 million. *Id.* at p. ii. In addition to refunding their existing bonded indebtedness at a much more favorable interest rate, in 2020 the Financing Districts also issued $10 million in bonds, with $9,811,962 in proceeds paid to Brookfield. Compl. ¶ 37.d.

20. The next bond issuance is not set to occur until 2025, with the final round of bonds issued in 2032. Compl., Ex. A at Exhibit D thereto, p. ii.

21. Additionally, the Financial Plan identifies several factors***, in addition to assessed property values***, that will impact the amount and timing of bonds the Financing Districts determine in their sole discretion may be issued, including: Brookfield's buildout schedule, inflation, assessment ratios, interest rates, debt service coverage requirements, infrastructure, and administrative and operating costs of the Districts (such as for maintenance of deficient/defective infrastructure with which Brookfield has saddled the Districts). *Id.* at p. v.

C. The Districts Have Cooperated with Brookfield Despite Unreasonable Demands and Threats; the Service District Has Never Refused to Reimburse Brookfield for Properly Documented Eligible Costs.

22. In its Complaint, Brookfield attaches only its one-sided correspondence demanding that the Financing Districts issue bonds on Brookfield's timeline. For instance, Brookfield's December 16, 2021 letter—sent at the height of the COVID pandemic—demanded that the Districts "agree" within less than 30 days to bond to the maximum remaining debt limit of $32,058,038 that theoretically could ever be owed to Brookfield. Compl., Ex. E, p. 2.

23. Conspicuously absent from this letter is any explanation as to why, legally, the Districts are obligated to repay Brookfield by its artificial deadlines. *See id.* Nor does this letter provide notice of any "Default" by the Service District as defined in the Reimbursement Agreement. *See id.*

24. While the Complaint references the parties' communications regarding bonding and baldly asserts that the Districts have "refused to issue new debt to repay [Brookfield]," Brookfield fails to attach the Districts' responsive correspondence to the Complaint. Compl. ¶¶ 40, 41, 55.[2]

25. The referenced correspondence demonstrates that the Districts have never "refused" to issue debt to reimburse developer costs, so long as those costs are properly documented and eligible for repayment. For instance, the Districts responded to Brookfield's December 16, 2021 letter on January 4, 2022, requesting documentation of the purported

[2] By referencing the parties' correspondence, which is integral to Brookfield's allegation that the Districts have "refused to issue new debt," this Court can consider the Districts' responsive correspondence that Brookfield selectively omitted. *See* Motion to Dismiss Standards, *infra* at p. 11.

$32,058,038 still allegedly owed and an accounting of project costs and how prior bond proceeds have been applied, including a calculation of the purported interest amounts paid. **Exhibit 1,** Jan. 4, 2022 letter from K. Duke to N. Arney.

26. Over the course of the next several months, the Districts' counsel worked with Brookfield's counsel in an attempt to obtain the requested information so that the Financing Districts could assess what, if anything, remains to be owed and when it would be appropriate to bond. *See, e.g.,* **Exhibit 2**, April 1, 2022 letter from K. Duke to N. Arney; **Exhibit 3**, July 11, 2022 letter from K. Duke to N. Arney.[3]

27. The parties' back-and-forth on the threshold question of how much more, if any, Brookfield is owed continued into the fall of 2022. *See* **Exhibit 4**, October 19, 2022 email chain between K. Duke and N. Arney. At no point, however, did the Service District refuse to repay Brookfield for eligible costs that are properly documented when the Financing Districts determine in their discretion it is appropriate to further bond.[4]

28. Nevertheless, Brookfield filed this lawsuit demanding that the Service District be Court ordered to cause the Financing Districts to immediately issue tax-based bonds of not less than $31,870,000 to repay Brookfield up to 10 years ahead of the schedule in the Service Plan.

[3] Out of an abundance of caution, this letter is redacted pursuant to a confidentiality agreement between the Districts and Brookfield concerning their consultants' analyses of the issues.

[4] These communications also demonstrate that the Service District has never "admitted" to owing the full remaining debt limit as Brookfield alleges. Compl. ¶ 42. These allegations are disingenuous on their face because they ignore that the Districts' statements were as to amounts "***the Developer believes*** qualif[y] as District Eligible Costs" or amounts Brookfield unilaterally booked as "advances" when it controlled the Service District. *See id.* at 42.d and 42.e.

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 1 for Breach of the Reimbursement Agreement Against the Service District Should Be Dismissed Because Brookfield Fails to Plausibly Plead a Breach; Regardless, Brookfield's Claim for Specific Performance Is Barred by Sovereign Immunity.

A breach of contract claims requires: (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. *Western Distributing Co. v. Diodosio*, 841

P.2d 1053, 1058 (Colo. 1992). "Contract interpretation is a question of law for the court to decide." *Copper Mountain, Inc. v. Indus. Sys., Inc.*, 208 P.3d 692, 696 (Colo. 2009). "The primary goal of contract interpretation is to determine and effectuate the intent and reasonable expectations of the parties" by "giv[ing] effect to the plain and generally accepted meaning of the contractual language." *Id.* at 697.

Courts "hold no authority to rewrite contracts and must enforce unambiguous documents in accordance with their terms." *McShane v. Stirling Ranch Prop. Owners Ass'n, Inc.,* 393 P.3d 978, 982 (Colo. 2017). Additionally, "[o]n a motion to dismiss, allegations in a complaint do not overcome contradictory statements in the text of a contract attached to [the] complaint." *Spring Creek Expl. & Prod. Co., LLC v. Hess Bakken Inv., II, LLC*, 887 F.3d 1003, 1018 (10th Cir. 2018) (internal citations omitted) (applying Colorado law).

Here, Claim 1 fails because: (A) Brookfield does not plead that the Service District is in breach of any repayment obligation set forth in the Reimbursement Agreement; (B) Brookfield tries to overcome this deficiency by morphing Claim 1 into an anticipatory repudiation claim, but Brookfield does not, and cannot, satisfy the elements of repudiation; and (C) regardless, Claim 1 is effectively one for specific performance, which cannot be ordered against special districts as governmental entities.

A. Claim 1 Fails to Identify any Contractual Obligation that the Service District Has Breached.

Brookfield alleges that the Service District breached the Reimbursement Agreement by failing to repay Brookfield as demanded by Brookfield. Compl. ¶¶ 52, 55, 56. Glaringly absent from Claim 1 is a citation to or analysis of any provision of the Reimbursement Agreement that

requires the Service District repay Brookfield up to the Financing Districts' maximum bonding capacity whenever Brookfield demands it. No such provision exists.

Rather, the terms of the Service District's payment obligations are addressed in section 5 of the Reimbursement Agreement, which Brookfield fails to address anywhere in its Complaint. SoF ¶¶ 13-15. Those repayment terms unambiguously provide that the Service District is obligated to repay Brookfield ***only when it receives bond proceeds from the Financing Districts***. Compl., Ex. B, p. 5, § 5 (providing that the Service District will repay eligible developer costs "***solely from the proceeds of Bonds***, if any, provided to the [Service] District [by the Financing Districts] pursuant to the terms of the Master IGA"). Brookfield does not—and cannot—allege that the Service District has failed to pay over any bond proceeds it has received from the Financing Districts.

Moreover, because the Master IGA gives the Financing Districts sole discretion to determine whether and when to bond (SoF ¶ 15), the Reimbursement Agreement contains no contractual deadline by which the Service District must fully repay Brookfield for all alleged developer costs. Compl. ¶ 54. Brookfield cannot inject an artificial payment deadline term into the Reimbursement Agreement simply based on its own self-serving demands that it be paid now. Because the Service District has not breached any contractual obligation, Brookfield conspicuously fails to allege that it has ever issued a notice of default and opportunity to cure as required by section 10 of the Reimbursement Agreement, which presents an independent basis for dismissal. *See* Compl., Ex. B, p. 7, § 10.

B. Because Brookfield Cannot Plead a Breach by the Service District, Brookfield Tries—But Fails—to Plead Anticipatory Repudiation.

Knowing it cannot plead a breach, Brookfield attempts to morph its breach of contract claim into an anticipatory repudiation claim. Compl. ¶ 54 (alleging that "FRMD [defined as all the Districts] have . . . refused to issue new debt to repay Solterra"). Aside from the fact that the Service District has no contractual obligation to issue debt to repay Brookfield, this bare allegation fails on its face to satisfy the elements of a repudiation claim. *Johnson v. Benson,* 725 P.2d 21, 25 (Colo. App. 1986) (requiring a definite and unequivocal manifestation of intention on the part of the repudiator not to perform when performance is due to sustain a repudiation claim). Regardless, the conclusory allegation that the Districts have refused to bond is implausible when considering the contradictory correspondence Brookfield references in, but fails to attach to, its Complaint. SoF ¶¶ 24-27. The Districts have never refused to issue bonds when appropriate, so long as the purported developer costs are eligible for reimbursement and properly documented. *Id.*

C. Claim 1 Is for Specific Performance, Which Is Barred by Sovereign Immunity.

Even if Brookfield could plead a breach of contract, the thrust of Claim 1 is Brookfield's demand that the Court order the Service District to cause the Financing Districts to issue debt to repay Brookfield. Compl., p. 10 ("WHEREFORE" clause). Setting aside Brookfield's fundamental misrepresentation that the Service District can somehow "cause" the Financing Districts to issue debt, Brookfield's claim, while couched as a "mandatory injunction," is one for specific performance. Brookfield is demanding that the Court compel the Service District to perform a contractual requirement (***specific performance***), as opposed to requiring an affirmative act not required by any contract but is necessary to maintain the status quo ***(mandatory***

injunction). *Snyder v. Sullivan*, 705 P.2d 510, 514, n. 5 (Colo. 1985) (explaining the difference between the two); *see also, e.g.*, *Louis Dreyfus Corp. v. Cont'l Grain Co*., 348 So. 2d 1286, 1288 (La. Ct. App. 1977) (rejecting label assigned by plaintiff where, as here, the relief requested was actually specific performance of contract).

The doctrine of sovereign immunity precludes claims for specific performance against governmental entities, including special districts. *Thompson Creek Townhomes, LLC v. Tabernash Meadows Water & Sanitation Dist.*, 240 P.3d 554, 556 (Colo. App. 2010) (dismissing developer's claim for specific performance against special district). The impossibility of Brookfield's requested relief provides yet another grounds for dismissal of Claim 1.

In sum, to take advantage of public entities and taxpayer dollars to finance its development, Brookfield put in place a series of contractual agreements that do not permit Brookfield to dictate when the Service District repays Brookfield. Brookfield should be held to the agreements it drafted and Claim 1 should be dismissed.

II. Claim 2 for Declaratory Judgment Should Be Dismissed to the Extent It Attempts to Obtain Specific Performance by Asking the Court to Declare the Districts Must Perform Alleged Contractual Obligations.

Like its requests for a "mandatory injunction," Brookfield's declaration requests are, in essence, requests for specific performance because they ask the Court to order that the Districts are obligated to take certain actions Brookfield believes are required by contract. *See, e.g.,* Compl. ¶ 64 (seeking order that the Service District "is obligated to cause [the Financing Districts] to issue general obligation or revenue bonds" and the Financing Districts are "obligated to issue" such bonds). As outlined in Section I.C above, the Court cannot order specific performance, and thus Brookfield's requested declarations at ¶ 64.b-d should be dismissed. *Taylor v. State Pers.*

Bd., 228 P.3d 273, 277 (Colo. App. 2010) (dismissing declaratory judgment claims where relief requested was unavailable).

III. Claim 4 for Breach of the Covenant of Good Faith and Fair Dealing Against the Service District Should Be Dismissed Because It Is Based on Conclusory Allegations that Are Contradicted by the Provisions of the Reimbursement Agreement.

Claim 4 is based on two different alleged breaches of good faith by the Service District in its performance of the Reimbursement Agreement: (1) not causing the Financing Districts to issue debt to repay Brookfield on the timeline demanded by Brookfield and (2) not taking possession of and maintaining public improvements constructed by Brookfield. Each is addressed in turn.

A. The Service District Has Neither the Obligation Nor the Authority, Implied or Otherwise, to Cause the Financing Districts to Issue Bonds.

The contractual "duty of good faith and fair dealing does not obligate a party . . . to assume obligations that vary or contradict the contract's express provisions. Nor does the duty of good faith and fair dealing inject substantive terms into the parties' contract. Rather, it requires only that the parties perform in good faith the obligations imposed by their agreement." *Amoco Oil Co. v. Ervin*, 908 P.2d 493, 507 (Colo. 1995), *as modified on denial of reh'g* (Jan. 16, 1996) (Vollack, J., concurring) (quoting *Wells Fargo Realty Advisors Funding, Inc. v. Uioli, Inc.*, 872 P.2d 1359, 1363 (Colo. App. 1994)).

Here, the Complaint fails to identify any contractual obligation in the Reimbursement Agreement that requires the Service District to cause the Financing Districts to issue bonds, which Brookfield contends forms the basis of the breach of good faith. Compl. ¶ 76. No such provision exists. Again, Brookfield simply ignores Section 5 of the Reimbursement Agreement, which provides that the Service District is required to pay over bond proceeds, ***if any,*** that are provided

from the Financing Districts pursuant to the Maser IGA. Compl, Ex. B, § 5. There is no allegation that the Service District has failed repay bond proceeds it received from the Financing Districts.

Moreover, Brookfield's "good faith" claim falsely assumes that the Service District has the ability to cause the Financing Districts to bond at Brookfield's behest. When Brookfield controlled the Boards of the three Districts it routinely treated them as one entity that Brookfield directed for its benefit. However, as a matter of law, they are separate governmental entities with their own elected Boards that are now governed by the community's residents. Additionally, under the Master IGA, the Financing Districts' decision as to whether and when to issue bonds is within their sole discretion, not at the Service District's discretion. SoF ¶ 15.

Thus, Brookfield's invocation of the covenant of good faith and fair dealing is a naked attempt to inject contractual requirements into the Reimbursement Agreement that do not exist because Brookfield is now dissatisfied with the contracts it drafted to take advantage of public tax dollars. Brookfield should not be permitted to "have its cake and eat it too" by ignoring the plain terms of the Reimbursement Agreement it drafted, which do not allow Brookfield to dictate when it is repaid.

B. The Allegation that the Service District Acted in Bad Faith by Not Accepting Brookfield-Constructed Infrastructure Fails Because Brookfield Does Not—and Cannot—Allege that It Satisfied the Acquisition Procedure Requirements that Are Necessary for Acceptance.

Brookfield alleges that the Service District breached its duty of good faith and fair dealing under the Reimbursement Agreement by not "accept[ing] and maintain[ing] the public improvements completed by [Brookfield]." Compl. ¶¶ 75-76. The alleged failure to accept those improvements purportedly resulted in Brookfield maintaining the Brookfield-built improvements longer than required under the Reimbursement Agreement. Compl. ¶ 49. Thus, as alleged by

Brookfield, under the Reimbursement Agreement, Brookfield was required to maintain Brookfield-built infrastructure until the infrastructure was accepted by the Service District "in accordance with the Infrastructure Acquisition Procedures ["IAP"] set forth in Exhibit A to the Reimbursement Agreement." *Id.* Other than vaguely identifying the IAP, Brookfield does not identify any contractual provision requiring the Service District to take possession of and maintain Brookfield-constructed infrastructure. *See* Compl. ¶ 49.

Brookfield glosses over the contractual basis for its purported claim because the IAP requires Brookfield to perform several contractual requirements before the Service District accepts public infrastructure. *See* Compl., Ex. B, at Exhibit A thereto, Infrastructure Acquisition Procedures ("The following paragraphs set forth the procedures that ***shall be required*** for any and all acquisitions by the District pursuant to this Agreement.") (emphasis added); *see Western Distributing Co*, 841 P.2d at 1058 (plaintiff's performance is an element of a contract claim).

For instance, prior to acceptance of public infrastructure, Brookfield was required to submit a "Purchase Application" to the Service District. Compl., Ex. B, at Exhibit A thereto, § A. This application must include developer supported documentation, such as evidence that the public infrastructure was constructed pursuant to a public bidding process and all final invoices of the chosen bidders. *See id.* at § A.ii. A certified engineer that, among other things, reviews the costs documented in the Purchase Application, inspects the public infrastructure and issues an Engineer's Certification, as appropriate, assessing whether costs are reasonable and ensuring the infrastructure is fit for its intended purpose. *Id.* at § B.i. The project costs are also subject to review and approval by the Service District's accountant. *Id.* The Service District's reimbursement costs are limited to those certified as reasonable by the engineer and "approved

by the District's Board as reasonable and appropriate." *Id.* at §B.ii. Once these steps are complete, there are several additional requirements for acceptance, including issuance of a Certificate of Acceptance by the City, the Service District's receipt of certified as-built plans from Brookfield, and execution of a bill of sale in the form attached to the IAP.

Other than a generic and conclusory allegation that it performed under the Reimbursement Agreement (Compl, ¶ 74), Brookfield fails to plead how it satisfied the IAP's explicit contractual requirements. Under the *Warne* standards, the Court need not accept Brookfield's threadbare allegation of performance, particularly given the Complaint attaches the IAP, which explicitly sets forth Brookfield's contractual obligations. Brookfield should not be permitted to proceed on a bad faith claim where it has not pled its own contractual performance that would give arise to the alleged duty to accept.

IV. Claim 5 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. Compl. ¶¶ 81, 84, 85. In addition to the defect with the alleged underlying breach claim against the Service District (*see* section I *supra*), 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.

V. 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, while couched as a promissory estoppel claim, Brookfield is, in fact, attempting to enforce contractual provisions in a contract to which Brookfield is not a party, i.e., the Master IGA. Compl. ¶¶ 44, 88. 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***. SoF ¶ 8. 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).

While Brookfield vaguely alleges that it had a "right to rely on the financing and payment obligations set forth in the Master IGA" (Compl. ¶ 45), Brookfield conspicuously fails to include a supporting citation to the Master IGA. Nowhere does the Master IGA provide that Brookfield, as developer, can rely on or enforce its terms. *See generally*, Compl., Ex. C. Brookfield's conclusory allegations in the Complaint "do not overcome contradictory statements" in the Master IGA attached to the Complaint, which expressly precludes third-party beneficiaries. *Gorsuch,* 771 F.3d at 1238. 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, Brookfield went to great lengths to expressly preclude third-party beneficiaries. The fact that it now regrets how it drafted the Master IGA does not relieve it of the consequences of its own language.

Finally, even if Brookfield could legally enforce the Financing Districts' alleged promises in the Master IGA, 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.

CONCLUSION

For the foregoing reasons, the Districts respectfully request that Claim 1 for Breach of the Reimbursement Agreement, Claim 2 for Declaratory Judgment (declarations located at ¶ 64.b-d), Claim 4 for Breach of the Duty of Good Faith and Fair Dealing, Claim 5 for Unjust Enrichment, and Claim 6 for Promissory Estoppel should be dismissed with prejudice pursuant to C.R.C.P. 12(b)(5) as set forth above.

Respectfully submitted this 13th day of January, 2023.

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CERTIFICATE OF SERVICE

I hereby certify that on this 13th day of January, 2023, a true and correct copy of the foregoing **DEFENDANTS' PARTIAL 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