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DISTRICT COURT, ADAMS COUNTY, COLORADO

1100 Judicial Center Drive
Brighton, Colorado 80601

Plaintiffs:

LENNAR COLORADO, LLC, a Colorado limited liability company; STRATUS AMBER CREEK, LLC, a Colorado limited liability company,

v.

Defendant:

AMBER CREEK METROPOLITAN DISTRICT, a quasi-municipal corporation and political subdivision of the State of Colorado.

Case No. 2021CV030392

Division: W

Cross-Plaintiff:

AMBER CREEK METROPOLITAN DISTRICT, a quasi-municipal corporation and political subdivision of the state of Colorado,

v.

Cross-Defendants:

LENNAR COLORADO, LLC, a Colorado limited liability company; STRATUS AMBER CREEK, LLC, a Colorado limited liability company, KRISTI BALKEN, an individual; ANDREW TRIETLEY, an individual; FRANK WALKER, an individual; WAYNE MATSUDA, an individual; ADAM COATES, an individual; JOHN CHENEY, an individual; RICHARD DEAN, an individual; CHRISTIAN DEAN, an individual; DOES 1-25.

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CROSS-DEFENDANTS' REPLY IN FURTHER SUPPORT OF THEIR RULE 12(b)(1) PARTIAL MOTION TO DISMISS CROSS-PLAINTIFF AMBER CREEK METROPOLITAN DISTRICT'S CROSS-COMPLAINT

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INTRODUCTION

The District's Opposition makes clear that it will do anything and say anything to avoid reimbursing Lennar and Stratus for the millions in public infrastructure costs actually incurred for the benefit of the Amber Creek community. As the Court knows, the District took a year to conduct jurisdictional discovery, which included eight depositions of all the individual Cross-Defendants and the exchange of tens of thousands of documents. Rather than marshaling the facts from that expensive and burdensome endeavor, the District goes low, resorting to fabrication and mud-slinging, weaving a tale of conspiracy and deception that is wholly unsupported by the record.[1] The undisputed facts, absent from the District's narrative, show that Lennar, Stratus, and the individual Cross-Defendants, together with the District's experienced, independent legal counsel and other District fiduciaries and advisors, acted completely above board in developing Amber Creek—a community which is now thriving due to their efforts.

It is the District's burden to prove jurisdiction—that is, to prove the individual Cross-Defendants lack CGIA immunity for the public work they conducted as members of the District's board. The District's Opposition fails to do so. For all of its rhetoric, the District **cannot prove** Cross-Defendants deviated from Title 32's special district statutory framework or the District's City-approved Service Plan. The District **cannot prove** that the various transactions on which its claims are based were illegal, improper, or anything more than a necessary incident to the development of Amber Creek. And critically, the District **cannot prove** the following essential jurisdictional facts:

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[1] All citations to lettered exhibits refer to exhibits to the Declaration of John Cheney, submitted in support of Cross-Defendant's Motion, and the Declaration of Gwen Burton submitted herewith. Citations to numbered exhibits refer to exhibits to the District's Opposition ("Opp.").

- The District cannot prove that it complied with the CGIA's notice requirement.
- The District cannot prove that its claims arise out of anything other than acts of public employees occurring within the scope of their public employment.
- The District cannot prove that the individual Cross-Defendants' actions approached anything remotely resembling "willful and wanton" conduct.
- The District cannot prove that the facts here are in any way similar to those at issue in *Tallman Gulch*.

In short, the facts show that the individual Cross-Defendants were public employees acting within the scope of their employment, in accordance with Title 32, and under the guidance of highly experienced District legal counsel and other fiduciaries and professional advisors. In reality, the District's quarrel is with Title 32, not with the conduct of any Cross-Defendant in this action. The District—in thrall to its current manager, Charles Wolfersberger[2]—is self-servingly trying to upend the legislature's will, even if it means vilifying Lennar and Stratus and defaming the individual Cross-Defendants in the process. The CGIA, properly construed, bars the District's claims against the individual Cross-Defendants baselessly asserted towards that end. The Court should grant Cross-Defendants' Rule 12(b)(1) Motion.

BURDEN OF PROOF AND REPLY TO RELEVANT FACTS

"[O]n a C.R.C.P. 12(b)(1) motion to dismiss, the plaintiff must carry the burden of proving jurisdictional facts adequate to support subject matter jurisdiction." *City and Cty. of*

[2] Wolfersberger is the President of Wolfersberger, LLC, which provides accounting and management services to districts, including Amber Creek. (*See* Ex. P, WolfersbergerLLC Website.) His website—which includes a section titled "Corporate-Controlled Metro Districts Operating in the Shadows"—reads like a generic version of the District's Cross-Complaint. (*Id.*) He is also a regular agitator for legislative reform to Title 32 and related issues. (*See, e.g.*, Ex. Q, Bill Summary, SB22-136.) As set forth below, Wolfersberger has made a cottage industry of turning homeowners against their communities' developers for his own financial gain, which is precisely what he is doing here.

Denver v. Crandall, 161 P.3d 627, 632 (Colo. 2007). The District has not done so and cannot do so here. Far from establishing the essential jurisdictional facts, the District's "Relevant Facts" are actually a spurious and manufactured set of "alternative facts" that are irrelevant to the narrow question of whether the individual Cross-Defendants are entitled to governmental immunity—which they clearly are. Nevertheless, given the egregiousness of the District's misrepresentations, Cross-Defendants are compelled to set the record straight.[3]

A. Title 32 Contemplates that Developers Will Often Control Newly-Formed Special Districts

The District complains that Lennar and Stratus entered into agreements to cooperate with one another and control the nascent District's Board (Opp. at 5-6), but this is the commercial reality of metropolitan district development in Colorado. Lost in the District's tale-telling is that "[i]t is common practice in Colorado for a metropolitan district that has been recently formed to be controlled by those directly connected with the development." *Carousel Farms Metro. Dist. v. Woodcrest Homes, Inc.*, No. 2015CV30013, 2015 WL 13856637, *5 (Colo. Dist. Ct. Apr. 1, 2015). Indeed, Title 32 expressly contemplates this reality,[4] and District legal counsel advised on the arrangement and helped prepare the agreement. (*See* Ex. R, 03/17/2014 Memo; Ex. S 03/27/14 Email.)

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[3] Cross-Defendants filed their Rule 12(b)(1) motion in July 2021, before discovery began. Extensive jurisdictional discovery has taken place in the year since. The District relied on this later-developed record in its Opposition, and Cross-Defendants similarly draw on it for this Reply. Particularly in light of the District's burden of proof here, the Court can properly consider the evidence Cross-Defendants submit with their Reply. *See, e.g.*, *In re Southern Recycling, L.L.C.*, 982 F.3d 374, 382 (5th Cir. 2020) (declining "to ignore evidence" submitted after Rule 12(b)(1) motion had been fully briefed).

[4] *See, e.g.,* C.R.S. §§ 32-1-808(2)(a) (permitting property transfers to qualify electors to serve on district boards); 32-1-103(5)(1)(II) (electors need not reside in the districts where they serve).

The District's fixation on the minutiae of Title 32's design is misplaced and does not evidence any wrongdoing. For instance, the District complains that the newly appointed Board members "rush[ed]" to ratify various agreements with Lennar and Stratus (Opp. at 6), but ignores that the same soon-to-be Board members had, in the preceding days, participated in drafting the agreements with the District's longtime legal counsel, who then reported on the agreements before the Board voted. (*See, e.g.*, Ex. T, 4/7/14 Email; Ex. U, 4/15/14 Email; Opp. Ex. 11 at 3, 4/15/14 Minutes; Opp. Ex. 5 at 2, 4/16/14 Minutes.)

The District also complains that the Lennar and Subordinate FAAs obligated the District to pay 7% interest on certified construction costs, whereas the prior developer charged no interest. (Opp. at 6.) But the District ignores that the prior developer's project ended in foreclosure, and that 7% was a "below market" rate reflective of Lennar and Stratus' own costs of capital at the time. (*See*, Ex. V, Balken Tr. at 81:14-82:14.) Likewise, the District faults Ms. Balken for voting to adopt agreements with Lennar and then signing on Lennar's behalf (Opp. at 6), but again, this is the practical reality of Colorado's legislative design, and Ms. Balken both complied with Title 32's disclosure requirements and testified that she was capable of "wear[ing] two hats" as project developer and Board member. (*See* Ex. C, Conflict Disclosures; Ex. V, Balken Tr. at 38:9-17.)

Finally, the District maintains that the individual Cross-Defendants conducted Board business in secret by holding meetings at Lennar's office 27 miles from the District (and thus 7 miles beyond the prescribed 20 mile radius). (Opp. at 18-19) As the record reflects, however, the District's legal counsel was responsible for ensuring the Board complied with the intricacies of Title 32, and the Board merely followed legal counsel's representation that Lennar's office was a

suitable location under Title 32. (*See* Ex. W at 2, 03/14/14 Email; *see also,* Ex. X, Trietley Tr. at 93:4-94:23; Ex. Y, Coates Tr. at 46:16-47:15; Ex. Z, Cheney Tr. at 112:15-113:3.)

B. The Board Acted With the Advice of District Legal Counsel, Accountants, Engineers, and Other Independent Professional Advisors When it Increased the District's Debt Limit and Issued Debt

1. Cross-Defendants Properly Relied on Guidance Provided by District Counsel on All Challenged Conduct

Barbara Vander Wall, of Seter & Vander Wall ("SVW"), served as general counsel to the District at all relevant times. She has "over 25 years of experience representing special districts," and "focuses the majority of her practice serving as general counsel to special districts." (*See* Ex. AA, Barb Bio.) Contrary to the District's innuendo, Vander Wall was hired as District counsel more than a decade before any Cross-Defendant became involved in the Amber Creek project. (Ex. BB, 7/2/03 Memo.) Critically, the record shows that SVW provided guidance to the District's Board on all challenged conduct, and the Board acted on that advice.[5]

2. Both Debt Limit Increases Were Cost-Driven, Approved by Thornton, and Intended to Benefit the District and its Residents

The District's skewed narrative obscures that seeking debt limit increases like the District did in 2014 and 2017 is akin to an individual applying for an increased credit limit on a credit card: applications must be supported, approval is not guaranteed, and a new, higher limit does not mean one must use all of the available credit. In other words, increasing a district's debt limit

[5] (*See, e.g.*, Ex. CC (SVW working on, submitting, and counseling Board on proposal for first debt limit increase, and working on, submitting, and counseling Board on proposal for second debt limit increase); Ex. DD (SVW counseling Board, marking-up, and signing-off on bond documents; advising Board that bond documents are "appropriate for execution," and issuing Opinions on 2017A, 2017B, and 2017C bonds).)

is just one step among several that a district may choose to undertake to pay for its public infrastructure—and each step is subject to various requirements and layers of review.

The District attacks both debt limit increases, from $8 to $12 million in 2014, and from $12 to $20 million in 2017. (*See* Opp. at 7-12.) As noted above, however, District counsel guided the application processes for both increases (*see* Ex. CC (SVW Advice re Debt Limit Increases)), and the District retained reputable engineering consulting firms to assist with both applications. (*See* Opp. Ex. 28, 5/5/14 MM&D; Opp. Ex. 32, 5/25/17 IDES.) Moreover, in both instances, after reviewing the District's initial applications, the City of Thornton and its experienced engineering staff conducted a rigorous review, seeking clarifications and requesting additional information, which the District provided. (*See* Ex. EE, 3/18/14 Letter; Opp. Ex. 15, 4/4/14 Letter; Opp. Ex. 17, 6/22/17 Letter; Opp. Ex. 40, 6/29/17 Email; Opp. Ex. 41, 6/29/17 IDES.) Only after Thornton's questions had been answered did it approve the increase to "enable the District to pay for the public improvements required to develop the Amber Creek Subdivision." (*See* Ex. FF, 2014 Council Commc'n; Ex. GG, 2017 Council Commc'n.)

With regard to the 2014 increase, the District claims that Andy Trietley falsely "inflated" a line item in the District's submission (from $1.5 to $2 million) "to paint a more urgent need to increase the District's debt limit than was warranted." (Opp. at 7-8.) This assertion, however, is refuted by the record, as the submission makes clear that the $2 million figure included various costs—i.e., "traffic signal fees, relocating the existing natural gas lines, and relocating or abandoning prior gas wells"—that are not reflected in the lower $1.5 million number. (*Compare* Opp. Ex. 15, at 3 4/4/14 Letter *with* Opp Ex. 16, 2/28/14 Schedule *and* Opp. Ex. 17 at Exhibit A, 4/15/14 Omnibus Agreement.) More importantly, the District cannot dispute that the increase

was warranted, as actual public infrastructure construction costs have now far exceeded $12 million, meaning that even the new, higher limit proved to be an overly conservative estimate. (*See* Opp. Ex. 48, IDES Cost Cert. No. 1; Ex. HH, IDES Cost Cert. No. 2.)

Rising costs led the District to seek a second increase in 2017. The District claims that Cross-Defendants "worked backwards" to "maximize developer cash" (Opp. at 8), but this claim ignores that any "cash" ultimately received by developers is merely reimbursement for costs actually incurred. Likewise, the District faults Cross-Defendants for purportedly failing to consider "whether infrastructure could be constructed without further public expenditures, i.e., through increased expenditure by the developers alone." (Opp. at 8.) As Balken explained, however, the end result is the same: homeowners ultimately pay for the infrastructure they enjoy, whether through property taxes owing to bond debt or—if the developer foots the bill—through higher home prices rolled into a mortgage.[6] (*See* Ex. V, Balken Tr. 40:6-24.)

The District also seizes on an email from Adam Coates, in which he expresses concern about potential "double counting" of costs, as evidence of wrongdoing. (Opp. at 9.) To the contrary, this email shows Coates prudently asking for a meeting with District counsel to ensure the District's application was accurate—i.e., not double counting. (*See* Ex. JJ at 3, 2/22/17 Email.) Moreover, even after District counsel provided additional "context" that assuaged some

[6] Notably, Wolfersberger agrees. (*See* Ex. II at 129, 4/21/19 Memo ("In theory, the annual cost of homeownership is approximately the same regardless of whether a homeowner purchases his/her home in a metro district. In a metro district, homeowners pay higher property taxes (to pay off the metro district debt) and have lower mortgage payments (because the builder sells the house at a lower price point because public infrastructure costs are funded with metro district debt). In a subdivision with no metro district, the homeowner has a higher mortgage payment but pays less in property taxes.").)

of his concerns, Coates renewed his request for a meeting and made clear that "[h]onesty" was the "best policy" for the District's debt limit increase application. (*Id.* at 1.)

The District also claims that "Coates, Matsuda, Cheney and Richard Dean retained Guy Ford from IDES to "concoct additional costs" to support the District's 2017 debt limit increase application. (Opp. at 9.) But there is no evidence—none—that Cross-Defendants retained IDES for an illegitimate purpose. In fact, the District's longtime counsel, Barbara Vander Wall, independently selected Ford to bid for the engineering work IDES did on the District's behalf. (*See* Ex. KK, 4/12/16 Email; *see also* Coates Decl. at ¶¶ 11-12.) And while the District repeatedly impugns Ford's work and conduct (including quoting his use of the words "bullshit" and "garbage" more than 15 times), there is also no evidence that Cross-Defendants participated in or even knew about Ford's supposed "concoction." This is the cracked foundation on which the District's Opposition rests. It is the Cross-Defendants' conduct that is at issue, and the District cannot abrogate the Cross-Defendants' CGIA immunity by misdirecting the Court's attention to the purported misconduct of a non-party that Cross-Defendants knew nothing about.

The District's attacks on Ford and IDES are not only irrelevant—they also misrepresent the record. For example, the District suggests Ford dragged his feet because the proposed increase was "a tall order," pointing to a "[t]hree week" delay in May 2017; highlights a sarcastic email from Ford to District counsel; and emphasizes the fact that Ford altered his approach at the last minute. (*See* Opp. at 10.) The record shows that Ford's work was delayed because his mother passed away in early May and he had to travel for her memorial service. (*See* Opp. Ex. 31, 5/22/17 Email.) Moreover, the out-of-context email in question was sent only to Vander Wall, and there is no indication that any Cross-Defendant ever saw it. (*Id.*) Further, the record

makes clear Ford changed his approach because he received new information that enabled him to improve his cost estimate. As he explained in a subsequent email to Coates immediately before sending his report to Thornton's staff:

> Just wanted to take a minute to tell you how helpful Wayne was in getting me some additional info on Amber Creek, the Project Reports he was able to create and send caused me to complete [sic] change my approach, stay up all night and get the Cost Analysis done. Much better approach with the information and format provided. Think it should sail through.

(*See* Ex. LL, 5/26/17 Email; *see also* Ex. MM, 5/25/17 Email.) Thus, even if Ford's "bullshit" email were not sent in jest, it is clear that he was communicating an entirely different message to Cross-Defendants.

The District's attacks on Ford's methodologies and conclusions also lack merit. First, the District claims Ford lied about reviewing invoices and that "none of the Lennar's [sic] directors corrected this falsehood." (Opp. at 10.) But the District's myopic fixation on "invoices" is a bright red herring that shows the District and its "expert" do not even understand how the various processes they assail actually work. Lennar provided Ford with its expenditure records, including system-generated AIAs—detailed records of amounts "invoiced" and subsequently paid that can be tied back to underlying contracts and proposals on a line item basis to understand Lennar's actual costs of construction. (Coates Decl. at ¶¶ 21-35). These expenditure records reflect Lennar's raw accounting data, and are the same records that Lennar uses to run its business. (*Id.* at ¶ 34). They are also precisely the information that Ford and IDES would have needed to complete their work for Amber Creek. (*Id.* at ¶ 33). In any event, the Board was aware that IDES obtained materials from sources other than Lennar, (*see, e.g.*, Ex. NN, 5/24/17 Email), so if Ford's report said he reviewed invoices, the Board would have no reason to believe otherwise.

Second, the District insists that Ford must have manipulated his way to a $24.1 million cost calculation because another District engineer, Bill Miller, previously estimated costs at $13.9 million. (Opp at 10.) This is an apples to oranges comparison, as Miller's estimate did not account for various categories of costs captured in Ford's work, including $5.5 million in offsite improvements and another $1.5 million in organizational costs, among others. (*Compare* Opp. Ex. 25, 3/25/17 MM&D *with* Opp. Ex. 32, 5/25/17 IDES.) Ford's work also considered both costs to date and projected future expenditures, and showed that the developers had already incurred $16.85 million in construction costs—millions more than Miller's estimate for the entire project—with significant work yet to be done. (*Id.*)

Finally, the District points out that Thornton staff "asked for more detailed cost figures" and that, after additional work and consideration, Ford revised his estimate, suggesting that these developments somehow reflect wrongdoing.[7] (Opp. at 11-12.) In fact, the opposite is true; that Thornton sought more detail evidences the rigors of its review process, and Ford's willingness to revise his estimate shows his commitment to getting it right. The District smears Ford with reference to another out-of-context email in which he referred to his own work as "garbage," but again, Ford's self-deprecating note went only to Vander Wall and there is no indication that any Cross-Defendant ever saw it. (*See* Opp. Ex. 44, 7/17/17 Email.)

[7] In particular, the District seizes on an email in which Coates instructed District counsel to "cease and desist" using Lennar's internal information until he had an opportunity to review and approve. (Opp. at 11.) The District paints this as a "threat[]," but on its face, it reflects nothing more than a desire to participate in decision-making related to the use of Lennar's confidential information. (*See* Opp. Ex. 35, 6/22/17 Email; *see also* Coates Decl. at ¶¶ 17-20.)

3. The District's Debt Issuance Was Market-Driven, Scoped by Independent Professionals, Approved by the District's Fiduciaries, and Intended to Benefit the District and its Residents

After vilifying Cross-Defendants for seeking to increase the District's debit limit to $20 million, the District admits that it issued a total of only $18.9 million in debt. (Opp. at 12-13.) In other words, though the District secured a higher credit limit, it did not max it out.

Why not? Put simply, the District spent 18 months working with underwriter D.A. Davidson, together with Metrostudy (who prepared a Market Analysis and Absorption Forecast), King & Associates (who prepared a Residential Appreciation Analysis and Commercial Market Study), and underwriter's counsel (Sherman & Howard) to pinpoint the optimal amount of debt to allow the District to maximize its ability to build infrastructure for the benefit of the community while also ensuring that the debt would be marketable, absorbable, and serviceable.[8] The District's fiduciaries, including its general counsel (SVW), bond counsel (Kutak Rock), accountant (CliftonLarsonAllen), and external financial advisor (North Slope Capital Advisors) also worked closely with and advised the District's Board throughout the process.[9]

The District's claim that the debt was "exorbitant" is demonstrably wrong. (*See* Opp. at 12-13.) According to the District, the 2017B and 2017C bonds were unnecessary because the roughly $15 million of proceeds from the 2017A bonds would have been "more than sufficient" to cover the $4.7 million in costs that had been certified at the time of issuance. (Opp. at 13.) This argument ignores the time, burden, and expense associated with a municipal debt issuance.

[8] (*See, e.g.*, Ex. OO (Professional guidance on bond issuance).)

[9] (*See, e.g.*, Ex. DD (SVW advising on bond issuance); Ex. PP (Other fiduciaries advising on bond issuance); Opp. Ex. 51, 10/11/17 Minutes; Opp. Ex. 52, North Slope Cert.)

By April 2018, not six months after issuance of the bonds, IDES had certified more than $15.5 million in reimbursable costs. (*See* Opp. Ex. 48, IDES Cost Cert. No. 1; Ex. HH, IDES Cost Cert. No. 2.) And by July 2019, Lennar and Stratus had submitted reimbursement requests for an additional $4 million in costs (*see* Opp. Ex. 76, Manhard Certification; Ex. QQ, Stratus Agreements), bringing total reimbursables to well above the District's $18.9 million in debt. In other words, the District needed the money, and given the costs of issuance—here, more than $280,000 in hard costs and $360,000 in discounts to the underwriter—conducting multiple debt raises within a few years' time would not have been in the District's financial interest. (Opp. Ex. 47, Final Closing Memo.)

The District's argument that the 2017C bonds were issued to Lennar at "extreme interest rates" is similarly deceptive.[10] The 2017C bonds bore a higher interest rate—10.625% per year—because they are the last to be paid and thus were a risk for Lennar.[11] (*See* Ex. SS at 17, 2017C Indenture of Trust.) More importantly, with no limitation on the date for prepayment or other prepayment penalty, it was clearly always contemplated that the District would refinance the 2017C bonds with investment grade debt after the development was substantially completed, and thus there was no realistic prospect that the bonds would cost the District anything close to $25

[10] Notably, the District's External Financial Advisor, North Slope Capital, certified that "the net effective interest rate . . . to be borne by the District for the [2017C bonds] does not exceed a reasonable current tax-exempt interest rate." (Opp. Ex. 52, North Slope Cert.)

[11] The District cherry-picks the projection scenario that fits its narrative, asserting that "Lennar will receive $25,777,107 for these bonds, nearly 15 times their face value." (Opp. at 13.) But as the Limited Offering Memorandum acknowledges, various factors beyond Lennar's control could have triggered drastically different outcomes. (*See* Ex. RR, LOM Excerpt (projecting that, with slower build-out and a reduced rate of revaluation, Lennar could receive only $3,887,801 in interest and no principal on the 2017C bonds—just over two times face value); *see also* Ex. Z, Cheney Tr. at 133:8-134:9.)

million. (*Id.*; *see also* Ex. Z, Cheney Tr. at 133:8-134:9 (explaining that it would be "grossly irresponsible" for the District not to refinance the 2017C bonds).) Again, Wolfersberger agrees. (See Ex. TT, 8/18/18 Email (explaining that it would be "unwise/unlikely" for the District to not refinance its debt by 2026).) Thus, at the rate that the 2017C bonds were accruing interest, even Wolfersberger recognized in 2018 that they were "unlikely" to cost the District even <u>two times</u> face value in interest. (*See* Opp. Ex. 46 at 4, Bond Projections (reflecting $2.65 million in accrued interest as of 2026).

C. Lennar and Stratus Were Reimbursed for <u>Actual Costs</u> of Construction

The District's feverish narrative that Lennar and Stratus enriched themselves through infrastructure cost reimbursements falls apart when you consider this basic fact: constructing public infrastructure is not itself a source of profit for developers like Lennar and Stratus. (*See* Coates Decl. at ¶ 5.) Developers build public infrastructure (e.g., roads, sewers, parks, landscaping improvements, etc.) as a necessary and valuable part of any development, which in turn inures to the benefit of the District and its residents. (*Id.* at ¶ 6.) In return, developers seek reimbursement for their actual public infrastructure construction costs. (*Id.*) That is what happened here. And though the District strains to breathe life into its imagined fraud, even its expert (who appears to have zero experience with special districts or the construction of public infrastructure) is forced to admit that there is **<u>no evidence that the District overpaid Lennar or Stratus</u>**. (*See* Wietholter Decl., Report at 6.)

Without evidence, the District resorts to more rhetoric and misdirection. For example, the District criticizes Ford's first cost certification because he reviewed "accounting runs" instead of invoices, with Cross-Defendants' knowledge. (Opp. at 14-15.) As explained above, however, the

District's focus on "invoices" misses the mark, as the system-generated expenditure records that Lennar provided are the functional equivalent of invoices and payment confirmations all rolled into one. (*See* Coates Decl. at ¶¶ 21-35.) Further, IDES (and Ford) told the Board they would comply with all applicable cost certification requirements (*see* Opp. at 14; *see also* Opp. Ex. 54, IDES Services Agreement), and developed a plan with District counsel to "meet legal requirements for the Amber Creek IA." (*See* Ex. UU, 08/30/17, 2017 Email.) IDES then worked diligently with Lennar, District counsel, and others to obtain the materials it deemed necessary to certify costs.[12] (*See* Opp. Ex. 48, IDES Cost Cert. No. 1.) And notably, to the best of Lennar's knowledge, the materials it provided were sufficient for IDES' needs. (*See* Coates Decl. at ¶¶ 29-35.) Thus, Cross-Defendants were not "concealing" anything, as the District claims—they were simply acting in reasonable reliance on the expertise of the District's professional engineer and the advice of its fiduciaries.[13]

The District's attack on IDES' second cost certification is more of the same. (Opp. at 17.) The District claims that IDES did not review purchase orders, contracts, or invoices, but instead "used snippets of Lennar's accounting run . . . with virtually no scrutiny of the underlying data." (Opp. at 17.) Again, the District misunderstands that Lennar's expenditure records are the underlying data. (*See* Coates Decl. at ¶¶ 21-35.) Moreover, the record makes clear that the

[12] (*See, e.g.*, Ex. VV (IDES' Work re Cost Cert. No. 1); Opp. Ex. 56, 9/13/17 Attachment.)

[13] The District also complains that IDES' first cost certification indicates that the District's accountant, not IDES, certified Stratus's costs. (Opp. at 16.) But as IDES' cost certification makes clear, Stratus's costs related to studies, planning, and design, (*see* Opp. Ex. 48 at C.2, IDES Cost Cert. No. 1), and thus were more appropriately assessed by the District's accountant—an option that was expressly permitted under the Subordinate FAA. (Opp. Ex. 7 at 3, Subordinate FAA (contemplating "review and approval by the District's accountant and engineer") (emphasis added).)

District is incorrect, as it reflects that IDES "was able to sort through more invoices," and had "sent out new Vendor Verification letters to verify payment." (Ex. WW, 12/28/17 Email; *see also* Ex. XX, 12/26/17 Email ("I have also reached out to Vendors again to confirm they've been paid."); Opp. Ex. 55, 7/18/18 Email ("IDES said they verified payment directly with the vendors.").

The District's accusation that Richard Dean "secretly signed" two bond requisition requests to transfer money to Lennar "without a public hearing" and against the advice of the District's counsel similarly misrepresents the record. (*See* Opp. at 18.) In fact, the District's accountant asked Dean to sign some checks for the District's administrative costs and Requisition No. 7—a requisition for approximately $50,000 to be paid **to the District**.[14] (Opp. Ex. 74, 7/10/18 Email.) Dean then asked District counsel if he could sign, but she advised him that, given the election of new directors, "it would be best to defer signing . . . until we can have the claims officially approved at a board meeting." (*Id.*) This is precisely what Dean did, and the minutes from the ensuing meeting reflect that the checks and Requisition No. 7 were indeed discussed. (Ex. ZZ, 7/27/18 Minutes.) In other words, contrary to the District's claim that Dean "ignored [counsel's] admonition," he actually heeded it exactly. (*See* Ex. AAA, 7/30/18 Email.) The other two requisitions that Dean signed on July 30 to transfer bond proceeds to Lennar were never the subject of counsel's instruction, and would not have been, as the release of those funds had already been authorized at a prior Board meeting. (*See* Opp. Ex. 71, 4/23/18 Minutes (noting adoption of IDES' Cost Cert. No. 2).) Indeed, Dean also signed a fourth requisition on July 30 to

[14] (*See also* Ex. YY, 6/28/18 Email attaching 2017A Requisition No. 7.)

transfer more bond proceeds to the District. Unsurprisingly, the District has not complained about that "secret" authorization, even though it was not discussed at the July 27 meeting. (*See* Ex. BBB, 2017A Requisition No. 9.)

* * *

In total, IDES certified $15,504,100.38 in public infrastructure costs incurred for the District's benefit, not including the additional $3,984,412.00 for subsequent public infrastructure costs and operational expenses that Lennar and Stratus seek to recover in this action.[15] To date, the District has paid out just $8,813,401.00 in reimbursements, plus the issuance of the risky 2017C bonds to Lennar (at a face value of $1,752,000.00 million—though no interest or principal has been paid to date).[16] In other words, while the District has received and continues to benefit from public infrastructure that cost nearly $19.5 million to construct, the District has reimbursed Lennar and Stratus less than $11 million of those costs. Even if Lennar and Stratus recover the additional $3,984,412.00 they are seeking in this action, they will still fall several millions of dollars short of recovering the actual public infrastructure costs and operational expenses for this development. These numbers alone definitively refute the District's baseless contention that Lennar and Stratus have profited—much less improperly so—from the public infrastructure constructed for the District.

[15] (*See* Opp. Ex. 48, IDES Cost Cert. No. 1; Ex. HH, AC00025696, IDES Cost Cert. No. 2; Opp. Ex. 76, Manhard Certification; Ex. QQ, Stratus Agreements.)

[16] (*See* Opp. Ex. 64, 2017A Requisition No. 1; Opp. Ex. 63, 2017A Requisition No. 2; Ex. CCC, 2017A Requisition No. 3; Ex. DDD, 2017A Requisition No. 4; Ex. EEE, 2017A Requisition No. 5; Ex. FFF, 2017A Requisition No. 6; Opp. Ex. 73, 2017A Requisition No. 8; Opp. Ex. 72, 2017B Requisition No. 1; Ex. GGG, 2017A Requisition No. 13.)

ARGUMENT

I. THE DISTRICT'S CLAIMS AGAINST THE INDIVIDUAL CROSS-DEFENDANTS ARE BARRED UNDER THE CGIA

A. The District's Claims Against the Individual Cross-Defendants Are Barred Because the District Failed to Comply with the CGIA's Notice Provision

The District's claims against the individual Cross-Defendants are barred for a simple reason: by its own admission, the District did not comply with the CGIA's notice provision.

"Before bringing a tort action against a public employee, the CGIA requires a claimant to provide written notification within [182] days of the discovery of the injury." *Middleton v. Hartman*, 45 P.3d 721, 729 (Colo. 2002); *see also* C.R.S. § 24-10-109(1). Here, the District discovered its alleged injuries, and the CGIA notice period was triggered, no later than April 21, 2019, when Wolfersberger—a non-lawyer—sent the homeowner Board members the blueprint for the District's Cross Complaint: a 142-page single-spaced "legal analysis" of the District's purported injuries and contemplated claims.[17] (Ex. II, 4/21/19 Memo; *see also Trinity Broad. of Denver, Inc. v. City of Westminster*, 848 P.2d 916, 925 (Colo. 1993) (noting that the "notice period is triggered when a claimant has only discovered that he or she has been wrongfully

[17] In fact, Wolfersberger was the architect of the present lawsuit long before he had any affiliation with Amber Creek. In early 2018, Wolfersberger met Carson and encouraged him to run for Amber Creek's board. (*See* Ex. HHH, 1/29/18 Email; Ex. III, 2/17/18 Email.) Wolfersberger's team even campaigned for Carson, creating "banners and postcards" and going door-to-door on Carson's behalf. (Ex. JJJ, 4/24/18 Email.) In the same email that Wolfersberger fed Carson "talking points" for his campaign, he also pitched his services, advising Carson that "the first actions the homeowner controlled board should consider is to hire an accounting/management firm that is independent from the Developer," suggesting that his firm would be the perfect fit. (Ex. KKK, 3/8/18 Email.) Even before Amber Creek formalized his retention in the Fall of 2018, Wolfersberger was beginning to build his case against Cross-Defendants. (Ex. LLL, 8/18/18 Email.) By Spring 2019, Wolfersberger's "legal analysis" was complete. (*See* Ex. II, 4/21/19 Memo.)

injured"). Yet the District never provided Cross-Defendants notice before filing claims against them in April 2021.

The District does not dispute this; instead, it argues that it would be an "absurd" and "meaningless exercise" to require that the District provide CGIA notice to itself. (Opp. at 31-32.) This contention is contrary to the law. The "plain language [of the CGIA notice provision] unambiguously requires notice in a suit against a state employee in which the plaintiff seeks to hold the state employee personally liable." *Middleton*, 45 P.3d at 730. Clearly, the notice provision is intended not just to benefit public entities, but public employees as well. *Id*. The District's "notice to itself" line ignores its statutory obligation to provide notice to the individual Cross-Defendants. Moreover, the District's cited authorities do not support its contention that the notice requirement does not apply here. *Cisneros v. Elder,* 506 P.3d 828, 833-34 (Colo. 2022), does not even mention the CGIA's notice requirement,[18] and *Woodsmall v. Regional Transp. Dist.*, 800 P.2d 63, 69 (Colo. 1990), holds that a claimant must substantially comply with it—which the District did not do. (Opp. at 32.)

The District's contention is also illogical. One well-settled purpose of the notice requirement is to enable the preparation of a defense. *Middleton*, 45 P.3d at 730. Given that purpose, the District's failure to provide notice is far from "meaningless." (Opp. at 32.) "Delay inflicts injury [] because evidence and witnesses disappear, memories fade, and events lose their

[18] The District cites *Cisneros* for the proposition that a court need not read the CGIA literally when doing so would lead to an absurd result. (Opp. at 32.) In *Cisneros*, however, the court merely read one word—"negligence"—expansively so as to give reasonable effect to the provision in question. 506 P.3d 828. Nothing about *Cisneros* suggests that it is ever appropriate to jettison an entire statutory provision, as the District asks this Court to do now.

perspective." *Scott v. People*, 490 P.2d 1295, 1297 (Colo. 1971). The injury to the individual Cross-Defendants here is clear, as the District unfairly misrepresents their inability to recall various facts as evidence of affirmative wrongdoing. (*See, e.g.*, Opp. at 28 (complaining that "Coates and Matsuda could not recall where the land conveyed to them was located"); Opp. at 28 (complaining that Coates and Cheney "did not know who paid the property taxes").[19]

Because compliance with the CGIA notice provision is a "jurisdictional prerequisite," the District's "failure of compliance shall forever bar any such action against" the individual Cross-Defendants. C.R.S. § 24-10-118(1)(a). Notably, with no facts in dispute—again, the District concedes that it did not comply—no *Trinity* hearing is necessary to decide the motion on this basis. *Trinity*, 848 P.2d at 925 (evidentiary hearing necessary to resolve a factual dispute).

B. The District's Claims Against the Individual Cross-Defendants Also Fail Because It Has Failed to Prove the Elements of CGIA Immunity Are Not Met

The District argues that the individual Cross-Defendants cannot benefit from CGIA immunity because "(1) they were not [ ] public employee[s], (2) their actions were not within the performance of their public duties or scope of their employment[, and] (3) their actions were willful and wanton." (Opp. at 21.) The District fails to meet its burden on these points.

1. The Individual Cross-Defendants Are Public Employees

The District concedes that it is a public entity and that Balken, Trietley, Walker, and Richard Dean were public employees. (*See* Opp. at 27-28.) Thus, on this point, the District argues only that Coates, Matsuda, Cheney, and Christian Dean were not public employees

[19] (*See* Ex. Y, Coates Tr. at 23:1-3 ("**Q. Did you ever pay taxes under this option contract?** A. I don't recollect."); Ex. Z, Cheney Tr. at 24:9-11 ("Q Okay. Did you pay taxes at any point on that land while you owned it? **A I'm not sure if I did or I didn't.**").)

because the "conveyances" which qualified them to serve as directors were allegedly "sham instruments." (Opp. at 28 (citing *Landmark Towers Ass'n, Inc. v. UMB Bank, N.A.*, 436 P.3d 1126 (Colo.App. 2016), *rev'd on other grounds*, 408 P.3d 836).)

The District's reliance on *Landmark* is misplaced. Title 32 specifically authorizes the transfer of property for the express purpose of qualifying eligible electors. *See* C.R.S. § 32-1-808(2)(a)(I). And that is precisely what happened here. *See* Ex. MMM, Options Contracts and Quitclaim Deeds; Ex. NNN, Notices of Publication.) Critically, Section 32-1-808(2) was never raised or considered by the court in *Landmark*. *See generally* 436 P.3d 1126.

Landmark is also distinguishable. There, the court concluded the option contracts at issue were sham instruments primarily because (1) the individual qualifying parcels were preposterously small; (2) the obligation to pay taxes under the option contracts was "illusory"; (3) "the organizers agreed amongst themselves that none of them would have to pay taxes on the parcels"; and (4) none of the organizers ever exercised their options to purchase. *Landmark*, 436 P.3d 1126, 1138. Here, by contrast, Coates, Matsuda, and Cheney (1) each purchased deeded, undivided 1/4th tenant in common interests in a more than 7,330 square-foot parcel, (2) were thus legally obligated to pay taxes, (3) never agreed amongst themselves that none of them would have to pay taxes, and (4) did, in fact, take title to the property in question. (Ex. MMM, Options Contracts and Quitclaim Deeds.) And although Christian Dean qualified by way of contract, his option entitled him to purchase an undivided 1/10th interest in a several acre lot—vastly larger

than the postage stamp-sized parcels at issue in *Landmark*—and obligated him to pay taxes thereon.[20] (*See id*.)

In short, all of the individual Cross-Defendants were properly qualified as eligible electors under Title 32 and *Landmark*. Thus, they were all public employees under the CGIA.

2. The District's Claims Concern Acts of Public Employees Within the Scope of Their Employment

According to the District, the individual Cross-Defendants are all liable for actions taken outside the scope of their public employment. (*See* Opp. at 23-24.) Critically, however, all of the actions at issue were either (1) necessarily incidental to the individual Cross-Defendants' roles as District Board members, and thus occurred within the scope of their employment, or (2) do not form the basis of any of the District's legal claims in this action.

"An act occurs within the scope of employment if it is 'necessarily incidental to the employment,' with the 'central inquiry [being] whether the employee is engaged in an activity that bears some relationship to the employer's business.'" *First Nat'l Bank of Durango v. Lyons,* 349 P.3d 1161, 1169 (Colo. App. 2015) (explaining that the determination "depends on an examination of the totality of the circumstances"); s*ee also, e.g.*, *Falcon Broadband, Inc. v. Banning Lewis Ranch Metro. Dist. No. 1*, 474 P.3d 1231, 1238-39 (Colo. Ct. App. 2018)

[20] The District also complains that the individual Cross-Defendants "[n]ever paid property taxes for their parcels." (Opp at 28.) But the District does not assert that any taxes went unpaid, and the statute requires only that one "own[] taxable . . . property" or be "obligated to pay taxes under a contract," not that one *personally* pay such taxes. *See* C.R.S. § 32-1-103(5). Had the legislature intended to require an elector to personally pay taxes, it could easily have done so, as it did in Title 31. *See* C.R.S. § 31-1-101(8) ("'Qualified taxpaying elector' means a qualified elector who . . . ***has paid an ad valorem tax on property owned by him*** . . . .") (emphasis added); C.R.S. § 31-10-1536 ("It is unlawful to take or place title to property in the name of another, ***or to pay the taxes, or to take or issue a tax receipt in the name of another*** for the purpose of attempting to qualify such person as a 'qualified taxpaying elector'") (emphasis added).

(holding that directors were immune under CGIA where there was no "evidence in the record to support Falcon's argument that it has sued the Directors in their private capacities").

Many of the actions the District points to were necessarily incidental to the individual Cross-Defendants' roles as District Board members because those actions were all directly related to the District's business. (*See, e.g.,* Opp. at 24 (claiming that Balken entered into the Lennar FAA on behalf of Lennar while she was a District Board member; that Coates and Matsuda worked with IDES to package Lennar's cost information for the District's use while they were District Board members; that Cheney began working to structure the District's bonds as he prepared to join the District's Board; and that Richard Dean negotiated agreements with the District on behalf of Stratus as he prepared to join the District's Board, met with D.A. Davidson to work on structuring the District's bonds while he was a District Board member, and submitted cost data to the District on behalf of Stratus while he was a District Board member).) Further, none of these actions are at all unusual given that "[i]t is common practice in Colorado for a metropolitan district that has been recently formed to be controlled by those directly connected with the development." *Carousel Farms Metro. Dist. v. Woodcrest Homes, Inc.*, No. 2015CV30013, 2015 WL 13856637, *5 (Dist. Ct. Colo. Apr. 1, 2015).

The balance of the actions raised in the Opposition are immaterial because they do not form the basis of any of the District's legal claims. (*See* Opp. at 24.) For example, the District complains that Balken consulted for Stratus within six months of resigning from the District's Board, purportedly in violation of C.R.S. § 24-18-105(3). (*Id.*) That statute does not prohibit former public employees like Balken from working in a private sector role related to their prior public service; but more importantly, none of the District's claims arise out of Balken's work for

Stratus. (*See* Cross Compl. ¶¶ 124-178.) Similarly, the District complains that Walker sold infrastructure to the District on Lennar's behalf after he left the District's Board. (*See* Opp. at 24.) But the District's claims address the Board's purported lapses related to the acceptance of such infrastructure, not Walker's role in approving those transactions for Lennar. (*See, e.g.*, Cross Compl. ¶¶ 127, 152, 160, 178.) The District also complains that Christian Dean participated in a meeting with his father Richard, then a District Board Member, and D.A. Davidson, related to the District's debt structure. (*See* Opp. at 24.) Again, none of the District's claims remotely relate to his participation in this meeting. (*See generally* Cross Compl.)

The District also argues that "an intentional tort committed by a public employee against the government cannot logically be within the scope of public employment," citing several vicarious liability cases that did not arise under the CGIA. (Opp. at 24-26.) This argument disregards the CGIA's plain language and impermissibly collapses two separate prongs of the relevant analysis into one. Under the CGIA, a public employee is immune from liability for any claim "occurring . . . within the scope of his employment," unless the act or omission was "willful and wanton." C.R.S. § 24-10-118(2)(a). Thus, a court must determine both (1) whether a public employee's act or omission occurred within the scope of his employment and separately (2) whether such act or omission was willful and wanton. *See, e.g.*, *Martinez v. Estate of Bleck*, 379 P.3d 315, 322 (Colo. 2016) (acknowledging a "scope of employment determination" and separately a "willful and wanton determination"); *L.J. v. Carricato*, 413 P.3d 1280, 1288-89 (Colo. App. 2018) (acknowledging that defendant's acts "occurred within the scope of his employment" and remanding to determine "whether the conduct was in fact willful and wanton"). The District would wrongly have the former requirement swallow the latter. In any

event, as addressed below, the District has not and cannot prove intentional tortious conduct by any individual Cross-Defendant.

Finally, the District argues the individual Cross-Defendants were not acting within the scope of their public employment because they violated two provisions of Title 24—which applies to State Government, generally—each time they caused the District to enter into an agreement or transaction benefiting Lennar or Stratus. (Opp. at 25-26 (citing C.R.S. §§ 24-18-109(2)(b) and 24-18-201(1).)) The District ignores that Title 32—which applies specifically to special districts—authorizes directors to vote on issues in which they have a personal interest if they disclose any conflicts of interest beforehand, C.R.S. § 32-1-902(3)(b), which is precisely what the individual Cross-Defendants did here. (*See* Ex. C, Conflict Disclosures.) The District's reliance on the more general Title 24 fails given Title 32's specific application to this case. *See People v. Cali*, 459 P.3d 516, 519 (Colo. 2020) ("[I]f different statutory provisions cannot be harmonized, then the specific provision will control over the general provision.").[21]

For all of these reasons, the District's claims arise out of acts of public employees occurring during the performance of their duties and within the scope of their employment. The District has not and cannot meet its burden in proving otherwise.

[21] Even if Titles 24 and 32 are to be read together, *both* of the District's cited statutes similarly allow directors to participate where, as here, conflicts are disclosed. *See* C.R.S. § 24-18-109(3) (permitting "[a] member . . . who has a personal or private interest in any matter" to vote "if he complies with the voluntary disclosure procedures under section 24-18-110"); C.R.S. § 24-18-201(1)(b)(V) (carving out contracts voted on "in accordance with section 24-18-109(3)(b)").

3. The District Fails to Show that the Individual Cross-Defendants' Acts Rise to the Level of Willful and Wanton Conduct

The District cannot come close to showing anything approaching "willful and wanton" conduct. As an initial matter, the District wrongly claims that "a willful and wanton finding does not require a threat of physical harm." (Opp. at 26-27.) The Colorado Supreme Court has made clear that it does:

> The parties here ask us to identify a single definition of willful and wanton conduct that is applicable in the CGIA context. We need not choose . . . as they all share a common feature—namely, a conscious disregard of the danger.

Martinez v. Estate of Bleck, 379 P.3d 315, 323 (Colo. 2016) (explaining that the "conduct 'must . . . exhibit [a] conscious disregard for [the] safety of others.'") (underline in original); *see also, e.g.*, *L.J. v. Carricato*, 413 P.3d 1280, 1288 (Colo. App. 2018) ("[P]ublic employees' actions are willful and wanton when the employees are consciously aware that their acts or omissions create a danger or risk to the safety of others, and they then act, or fail to act, without regard to the danger or risk.").

The District does not claim that Cross-Defendants' conduct created any risk of danger—much less exhibited a conscious disregard for the safety others—and thus implicitly concedes it cannot show wanton conduct. Instead, the District attempts to read "wanton" out of the CGIA entirely, focusing solely "on *intent*"—i.e., willfulness. (Opp. at 27.) But "willful" and "wanton" are separate requirements, both of which need to be met. *Compare Willful Misconduct*, Black's Law Dictionary (8th ed. 2004) ("Misconduct committed voluntarily and intentionally.") *with Willful and Wanton Misconduct*, Black's Law Dictionary (8th ed. 2004) ("Conduct committed with an intentional or reckless disregard for the safety of others, as by failing to exercise ordinary care to prevent a known danger . . . .").

The District's cases are inapposite. *Brace* did not hold that wrongful discharge and tortious interference with contract claims could result in a willful and wanton conduct finding, as the District contends (Opp at 26-27); it merely mentioned the trial court's apparently erroneous findings—which it described as "very short," "ambiguous," and "susceptible to more than one interpretation"—in passing, and instead held that determinations under § 24-10-118(2)(a) are not appealable on an interlocutory basis. *See City of Lakewood v. Brace*, 919 P.2d 231, 236 (Colo. 1996), *abrogated by Martinez*, 379 P.3d at 321-22. The District also cites *Robinson v. City & Cnty. of Denver*, 39 F.Supp.2d 1257, 1264 (D. Colo. 1999), as a case finding willful and wanton conduct where the defendants "knowingly disregarded [the] plaintiff's rights." (Opp. at 27.) *Robinson*, however, improperly narrowed the applicable standard, as the Colorado Supreme Court case on which it relied—*Pettigell v. Moede*—made clear that "[w]antoness signifies an even higher degree of culpability in that it is wholly disregardful of the rights, feelings, ***and safety*** of others." 271 P.2d 1038, 1042 (Colo. 1954) (emphasis added).

Even if intentionality alone were sufficient to satisfy the controlling standard (it is not), the District still cannot meet its burden. The District's rhetoric and conspiratorial conjecture aside, the facts at issue amount to nothing more than the routine functioning of a metropolitan district under the applicable legislative framework. (*See* Reply to Relevant Facts, at A.) Further, throughout the period in question, the individual Cross-Defendants worked closely with and acted under the guidance of the District's legal counsel and other licensed fiduciaries and professional advisors. (*See* Reply to Relevant Facts, at B, C.) The District does not seriously contend—much less identify any evidence—that the individual Cross-Defendants' reliance on the District's experienced advisors was improper, much less that it evinces intentional

misconduct. (*See generally*, Opp.) Based on the undisputed facts, the District cannot meet its burden of showing any willful or wanton conduct by Cross-Defendants.

C. *Tallman* is Inapposite

Tallman essentially holds that when a public entity sues its employee, the employee may or may not benefit from CGIA immunity. (2/11/22 Order at 3.) Beyond that, *Tallman* is of limited utility, as its holding was expressly cabined to the specific facts at issue in that case. *See Tallman Gulch Metropolitan District v. Natureview Development, LLC*, 399 P.3d 792 (Colo. App. 2017). As such, the District's insistence that "*Tallman* should apply" is misplaced; by its own terms, *Tallman* is not dispositive. (Opp. at 21.) That said, to the degree that *Tallman* may inform the Court's analysis, the pronounced differences between that case and this one further confirm that the individual Cross-Defendants should benefit from CGIA immunity.

Tallman is, at its core, a case about a failed development project, and a developer who—acting as president of the district's board—concealed his own conflicts of interest and the project's compromised financial state and impending foreclosure when he "approved the issuance of bonds in a financially reckless manner and in bad faith." *Tallman*, 399 P.3d at 793-795. Critically, in *Tallman*, the developer sold only 4 of 86 lots, completely depleted his construction loan but only constructed one-third of the planned public infrastructure, and then defaulted on the loan. *Id.* at 793. When the bank initiated foreclosure proceedings, the developer secretly approved the issuance of more than $4 million in bonds to his company. *Id.* Just ten days later, the district court authorized the public trustee sale of the development. *Id.*

Here, by contrast, the Amber Creek development is complete and thriving, with average home values up significantly in recent years.[22] Moreover, the District's accusations of foul play are baseless. (*See* Reply to Relevant Facts.) Unlike *Tallman*, this is not a case about a rogue developer siphoning money out of a cratering development project for personal gain; instead, it is a case about a rogue District manager crusading against Title 32, stiffing developers for rightfully owed reimbursements, and tearing down the good names of innocent people who were simply trying to do their jobs and do right by the District and its future residents.

II. THE COURT SHOULD DISMISS THE DISTRICT'S CLAIMS AGAINST LENNAR AND STRATUS FOR BREACH OF FIDUCIARY DUTY, AIDING AND ABETTING BREACH OF FIDUCIARY DUTY, AND DECLARATORY RELIEF

Cross-Defendants concede the point that, as private entities, Lennar and Stratus may not benefit from CGIA immunity. However, the premise of Cross-Defendants' argument—that if the District's claims against the individual Cross-Defendants fail (for a reason other than governmental immunity), then they also must fail against Lennar and Stratus due to the derivative nature of the supporting allegations—remains legally valid. For the reasons set forth more completely in Cross-Defendants' pending motion to dismiss pursuant to Rule 12(b)(5), the

[22] When Lennar began selling homes in Amber Creek in 2016, prices started in the mid-$300,000's. (*See* Ex. OOO, 2/8/16 Press Release.) Publicly available data indicate that, as of August 2022, values for properties owned by the District's homeowner declarants have increased significantly in recent years. (*See* Ex. PPP, Rosener; Ex. QQQ, Carson; Ex. RRR, Jones.)

Purchaser	Purchase Date	Purchase Price	Zillow Estimate	Redfin Estimate
Ray Rosener	April 2017	$439,500	$659,300	$703,805
Kevin Carson	May 2017	$500,000	$742,900	$787,788
Matt Jones	August 2017	$451,200	$668,000	$667,695

District's claims against the individual Cross-Defendants are insufficiently pled and should be dismissed. (*See* 12(b)(5) Motion, at 17-18.) The Court may elect to treat a motion brought under one rule as though it was brought under another. *See, e.g.*, *Hansen v. Barron's Oilfield Serv., Inc.*, 429 P.3d 101, 103 (Colo. App. 2018) ("Although Barron's motion to dismiss was nominally filed pursuant to C.R.C.P. 12(b)(5) . . . we analyze [it] as a motion under C.R.C.P. 12(b)(1)."). The Court should treat this argument as one brought pursuant to Rule 12(b)(5) and likewise dismiss the District's derivative breach of fiduciary duty, aiding and abetting breach of fiduciary duty, and declaratory relief claims against Lennar and Stratus.

The District asserts that Cross-Defendants' argument "rests on the mistaken premise that Lennar and Stratus are being sued for actions [ ] taken solely by their employees." (Opp. at 31.) It is the District who is mistaken. With regard to its breach of fiduciary duty claim, the District alleges that the individual Cross-Defendants "owed direct fiduciary duties" (Cross Compl. ¶ 150), but that Lennar and Stratus's purported duties arose derivatively "on account of their control of their employees who served on the board, or as the principal of their representatives who served on the [ ] board and who independently owed fiduciary duties," (*id.* ¶ 151). There is no basis in law for this *indirect* fiduciary duty concept, and the District does not seriously contend otherwise. (*Contra* Opp. at 31 (arguing instead that "Lennar and Stratus took numerous independent actions ***to assist*** the individual Cross-Defendants to breach ***their*** fiduciary duties") (emphasis added).) Even if there were, however, the deficiencies causing the District's claims against the individual Cross-Defendants to fail would be equally fatal to its claims against Lennar and Stratus. The same is necessarily true of the District's aiding and abetting claim. *See, e.g.*, *G.A. Resort Condo. Ass'n, Inc. v. Chicago Title Timeshare Land Tr., Inc.*, No. 19-cv-01870-

RM-GPG, 2020 WL 7022354, at *3 (D. Colo. Nov. 30, 2020) ("Plaintiff's failure to state a breach of fiduciary duty requires that its derivative claim for aiding and abetting be dismissed as well.").

Finally, with regard to the District's request for declaratory relief, that "Lennar and Stratus are counterparties to the agreements and transactions at issue" does not change the fact that the underlying allegations—other than those related to TABOR, addressed below—turn entirely on actions undertaken by the individual Cross-Defendants in their capacities as members of the District's Board. (*See* Cross Compl. ¶¶ 169-171, 174-178; Opp. at 33 ("As detailed in [¶¶] 169-171 of the Cross-Complaint, all of the contracts at issue were approved by board members who had impermissible conflicts.").) Thus, again, if the District's claims against the individual Cross-Defendants fail, so too must its request for declaratory relief vis-à-vis Lennar and Stratus.

III. THE DISTRICT LACKS STANDING TO SEEK RELIEF FROM ANY CROSS-DEFENDANT UNDER TABOR

The District concedes that it lacks standing to seek relief under TABOR. (Opp. at 33.) This concession is important because the District's TABOR-related allegations are the only allegations not otherwise addressed by Cross-Defendants' pending 12(b)(5) motion and the portions of the present motion that the Court should consider therewith. (*See generally* Rule 12(b)(5) Motion; *see also* Section II above). In light of the District's concession and the various grounds Cross-Defendants have articulated under Rule 12(b)(5), the Court should dismiss the District's request for declaratory relief entirely.

CONCLUSION

For the foregoing reasons, Cross-Defendants respectfully request that this Court enter an Order granting its Rule 12(b)(1) Partial Motion to Dismiss the District's Cross-Complaint, and dismiss with prejudice all claims against the individual Cross-Defendants.

Dated: August 12, 2022.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of **CROSS-DEFENDANTS' REPLY IN FURTHER SUPPORT OF THEIR RULE 12(B)(1) PARTIAL MOTION TO DISMISS CROSS-PLAINTIFF AMBER CREEK METROPOLITAN DISTRICT'S CROSS-COMPLAINT** was filed using Colorado Courts E-Filing and served via the manner indicated below on August 12, 2022, to the following:

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s/ Ben Marquez