DISTRICT COURT, ADAMS COUNTY, COLORADO Adams County Justice Center 1100 Judicial Center Drive Brighton, Colorado 80601 Phone: (303) 659-1161	DATE FILED: July 15, 2022 5:22 PM FILING ID: EE0DE9093AF56 CASE NUMBER: 2021CV30392
Plaintiffs: LENNAR COLORADO, LLC, et al., v. **Defendant:** AMBER CREEK METROPOLITAN DISTRICT, a quasi-municipal corporation and political subdivision of the State of Colorado.	▲ **COURT USE ONLY** ▲
Cross-Plaintiff: AMBER CREEK METROPOLITAN DISTRICT, a quasi-municipal corporation and political subdivision of the State of Colorado. v. C**ross-Defendants:** LENNAR COLORADO, LLC, et al.	Case No: 2021CV30392 Division: W
Attorneys for Amber Creek Metropolitan District: Paul C. Rufien, #19948 Paul C. Rufien, P.C. 3900 East Mexico Avenue, Suite 300 Denver, Colorado 80210 Telephone: 720-506-9230 E-mail: paul@rufienlaw.com Michael J. Reiser, #16161 REISER LAW, P.C. 1475 N. Broadway, Suite 300 Walnut Creek, California 94596 Telephone: 925-256-0400 Facsimile: 925-476-0304 E-mail: michael@reiserlaw.com	

Sam Ferguson
FERGUSON LAW PC
1816 5th Street
Berkeley, CA 94710
Telephone: (510) 548-9005
sam@fergusonlawpc.com

Tyler Meade (PHV Forthcoming)
THE MEADE FIRM P.C.
12 Funston Ave., Suite A
San Francisco, CA 94129
Telephone: (510) 843-3670
Facsimile: (510) 843-3679
tyler@meadefirm.com

AMBER CREEK'S OPPOSITION TO CROSS-DEFENDANTS' RULE 12(B)(1) PARTIAL MOTION TO DISMISS

Defendant/Cross-Claimant Amber Creek Metropolitan District ("Amber Creek" or the "District") submits this Opposition to Cross-Defendants' Rule 12(b)(1) Partial Motion to Dismiss.

I. INTRODUCTION

The District's cross-complaint alleges a multi-year scheme by Cross-Defendants Lennar Colorado, LLC ("Lennar") and Stratus Amber Creek, LLC ("Stratus") to run the District for their own profit. They installed employees to the District's board of directors ("Board"), who in turn prioritized Lennar's and Stratus's interests over the District's. For Lennar, this was achieved through Cross-Defendants Andrew Trietley, Kristi Balken, Frank Walker, who initially served on the Board in 2014, and through Adam Coates, Wayne Matsuda and John Cheney, who succeeded them. For Stratus, this was achieved through its owner Cross-Defendant Richard Dean and his son Christian Dean.

Evidence obtained in jurisdictional discovery overwhelmingly supports the District's allegations. But relevant here, it underscores the inapplicability of the Colorado Governmental Immunity Act ("CGIA") to the District's claims, because (1) Cross-Defendants acted with willful and wanton disregard of the District's rights, including by conducting public business in secret in Lennar's private offices and failing to adequately disclose conflicts of interest, (2) Cross-Defendants undertook actions outside the scope of their public employment and in their private capacities to harm the District, and (3) in the case of Coates, Matsuda, Cheney and Christian Dean, they were never properly qualified to serve on the Board. In fact, Cross-Defendants were so confident in their scheme to manipulate a government entity that the executives for both Lennar and Stratus entered into a written cooperative agreement on how to divide up control of the public officials who would be serving on the District's board.

The Cross-Defendants' actions fly in the face of the State's policies that "…formation of public policy is public business and may not be conducted in secret," C.R.S. § 24-6-401, and "The holding of public office… is a public trust, created by the confidence which the electorate reposes in the integrity of public officers… [and] local government officials… A public officer [or] local government official… shall carry out his duties for the benefit of the people of the state." C.R.S. § 24-18-103.

Cross-Defendants' actions were egregious. The scheme to siphon funds from the District was accomplished through Lennar and Stratus's control of the Board. The individual Cross-Defendants implemented a predetermined plan by adopting contracts with Lennar and Stratus within just seven minutes of taking office, including two infrastructure agreements relevant here. They repeatedly lied to Thornton in seeking increases to the District's debt ceiling: first in 2014, when Trietley inflated District obligations to urge adoption of a $4 million increase, then in 2017, when Cross-Defendants Coates, Matsuda, Cheney and Richard Dean retained engineer Guy Ford from Independent District Engineering Services to present phantom cost figures to Thornton for another $8 million increase. "**Can't believe they bought that garbage!**" Ford bragged after Thornton staff recommend the proposal.

When the District issued debt in October 2017, the Cross-Defendants did not consider how much debt the District ***should*** borrow, but how much debt it ***could*** borrow. The debt ultimately issued includes the 2017C Junior Lien Bonds: $1,752,000 of debt at 10.625% compounding interest issued directly to Lennar that will ultimately pay $25,777,107 at an approximately 40% net effective interest rate.

As guardians of public finances, the Cross-Defendants were supposed to ensure that expenditures of bond proceeds were authorized and supported by proper documentation. In the case of "reimbursements" to Lennar and Stratus, the District was only supposed remit payments based on receipt and review of construction contracts, purchase orders, invoices, evidence of payments, as-built drawings and other construction documents. But Cross-Defendants authorized millions of dollars in payments without receipt of these documents. The District was also supposed to have its "independent engineer" and an accountant review this documentation. Neither review occurred. Instead, Cross-Defendants retained Ford from IDES to author a sham cost certification report representing that he reviewed Lennar's invoices, when in fact he had not. Cross-Defendants knew this to be false as private emails show Lennar never submitted invoices to Ford. With respect to Stratus, the District remitted $372,000 to Stratus, even though there was no engineer's review of Stratus's costs. The payment to Stratus was authorized by Stratus's owner Richard Dean as president of the District.

To perpetrate this scheme, Cross-Defendants thwarted independent oversight and public policy that prohibits conducting public business in secret. District meetings were held in Lennar's private offices 27 miles from the District. In February 2018, when a vacancy opened on the Board, Cross-Defendants installed Richard Dean's son Christian even though independent homeowners were eligible to serve. (Christian was not a homeowner). When homeowners ran for seats in Spring 2018, Cross-Defendants caused the District to send covenant violation notices to homeowner candidates for displaying campaign signs. Cross-Defendant John Cheney of Lennar met with several candidates, including Kevin Carson, at a Starbucks in the Spring of 2018 to discourage them from running.

For years, Cross-Defendants ran the District as a piggy bank, abusing their public trust. The District seeks redress for these wrongs and its day in Court. The CGIA does not bar suit. What follows is a summary of the evidence the District will present at a *Trinity* hearing.

II. RELEVANT FACTS

A. Lennar and Stratus Acquire the Amber Creek Subdivision and Appoint Employees to Control the District

In 2014, Lennar and Stratus acquired the Amber Creek subdivision. As part of this transaction, Richard Dean — Stratus's manager and an owner through a family partnership — and Andrew Trietley (amongst others) negotiated to "control" the Board. Ex. 1 (PSA) at 15 (referencing "District Control Agreement"), 27 (Dean signature); Ex. 2 (Trietley Depo.) 14:24-15:3, 19:6-10; Ex. 3 (R. Dean Depo.) 7:17-8:7 (Dean ownership). Lennar and Stratus also entered an "Agreement Regarding Cooperation," whereby they divvied up Board seats between them. Ex. 4 at 1 § 1(A). As is clear from what followed, they did so to ensure Lennar and Stratus controlled the public purse.

To accomplish this goal, their private deal had another term: the District would enter into agreements with Lennar and Stratus for infrastructure reimbursement. Ex. 1 at 14 (12(i)); Ex. 2 at 27:1-9. The District's fate was thus pre-determined by the private parties who controlled the Board.

As soon as Lennar and Stratus's transaction closed, they caused Cross-Defendants Andrew

Trietley, Frank Walker and Kristi Balken from Lennar and Richard Dean from Stratus to be appointed to the Board. Ex. 5 (4/16/14 Board Minutes). These Cross-Defendants voted immediately to ratify seven contracts with Lennar and Stratus, *id.* at 2-3, including most significantly here the Facilities Acquisition Agreement between the District and Lennar, Ex. 6, and the Subordinate Facilities Acquisition Agreement between the District and Stratus, Ex. 7. In ratifying these agreements, they completely overlooked the District's interests. Indeed, ratification was predetermined pursuant to Lennar and Stratus's purchase and sale agreement. Ex. 1. at 14 (12(i)). Cross-Defendants Trietley, Walker, Balken and Dean did not consider these agreements as fiduciaries of the District. Indeed, they spent fewer than seven minutes "discussing" and "considering" the dense contracts.[1]

Rushing to adopt these agreements benefitted Lennar and Stratus. For instance, a prior infrastructure agreement did not bear any interest. Ex. 8 (Infrastructure Acquisition Agreement) at 1 ¶ 2; Ex. 9 (Balken Depo.) 88:18-90:9. But two of the new agreements — the Lennar Facilities Acquisition Agreement and the Subordinate Facilities Acquisition Agreement with Stratus — imposed 7% interest on the District for Lennar's and Stratus's infrastructure costs. Ex. 6 ¶ 6; Ex. 7 ¶ 6; Ex. 9 at 88:18-90:9. These agreements also committed the District to acquiring infrastructure from Stratus and Lennar, thereby preventing the District from seeking alternative contractors, even if those builders were cheaper. They thus laid the groundwork for millions of dollars in future fraud.

While Cross-Defendants Trietley, Balken, Walker, and Dean have testified that they satisfied their fiduciary duties to the District, the record reflects otherwise. Balken, for instance, acknowledged that she was required to work in the District's best interest, to be thorough in her review, and not consider Lennar's interests. Ex. 9 at 34:14-36:15. But she voted to adopt several agreements with Lennar *where she signed on behalf of Lennar as counterparty to the District*, including the Lennar Facilities

[1] The meeting began at 3:00 p.m. and ended at 4:30 p.m. Ex. 5. The minutes note that "Ratification of Agreements" took place after "Confirmation of Closing" and "Appointment of New Board Members." The "Confirmation of Closing" occurred at 4:23 p.m., Ex. 10 (4/16/14 email); Ex. 9 at 99:5-100:24., meaning the board had fewer than 7 minutes to review and approve all those agreements.[1]

Acquisition Agreement. Ex. 6 at 7; Ex. 9 at 78:10-18. She also claims that she reviewed all agreements with the District's counsel, Ex. 9 at 79:2-12, but that was not possible in seven minutes. Any discussions she may have had with District counsel would have been as an employee of Lennar.

There are also irregularities in the April 16, 2014 meeting minutes, further reflecting the Board's disregard of the District's interests. For instance, the minutes note a "Notice of Director Vacancy" was published and after "ten (10) days" no eligible electors submitted a letter of interest to fill the vacancy. Ex. 5 at 2. That was impossible, as the prior directors resigned minutes before the new directors were appointed. *Id.* The April 16 meeting was also carried over from an April 15 meeting. Balken signed the April 15 minutes as "Secretary for the Meeting," Ex. 11 (4/15/14 minutes) at 5, even though she was not a District director and did not attend the meeting on April 15. *Id.* at 1; Ex. 9 at 45:18-51:12.

B. Dean, Trietley and Others Misrepresent the District's Financial Condition to Thornton in Order to Obtain a Service Plan Amendment

The next step in Lennar's and Stratus's fraud was to increase the District's debt ceiling from $8 to $12 million. Pursuant to a Sixth Amendment to the Purchase and Sale Agreement, Lennar and Stratus privately agreed that the District would seek a service plan amendment to accomplish the increase. Ex. 12 at 2, ¶ 5(a). Additionally, they agreed that Stratus would pay Lennar $1.2 million if Thornton did not approve the increase by 2019. *Id.* at 3, ¶ 5(b).[2] The District was not involved in these negotiations; again, the District's trajectory was set through private agreement.

While the District technically submitted the service plan amendment application to Thornton, Lennar's agent — Cross-Defendant Trietley — apparently crafted the messaging. Exs. 13 (4/4/14 email) & 14 (draft letter); Ex. 2 at 82:9-83:20. Trietley sent the District a draft service plan submission, Exs. 13 & 14, which the District incorporated and sent to Thornton. Ex. 15 (letter to Thornton). Treitley's letter suggested the District's reimbursement obligations were $2 million. This was false; the District's

[2] None of Stratus's or Lennar's directors, including Trietley, Blaken, Walker and Richard Dean, ever disclosed to the public that Stratus would owe Lennar $1.2 million if the Service Plan Amendment was not approved. *See generally* 7/2/21 Cheney Decl. in Support of 12(b)(1) Motion, Exs. B and C.

obligations at the time were $1,480,500.56, meaning the letter inflated District obligations by 33%. Ex. 16 (schedule of debt and payables); Ex. 2 at 83:21-84:16. *See also* Ex. 17 (Omnibus Agreement) at Ex. A (noting outstanding obligations under $1.5 million); Ex. 2 at 85:6-87:19. The effect of this falsehood was to paint a more urgent need to increase the District's debt limit than was warranted, a pattern that repeated three years later when the District sought another increase. To underscore Lennar's control, the "District" adopted Trietley's letter even though he was not a board member at the time. Ex. 13 (transmission date of 4/4/14 — 12 days before Trietley was appointed to board on April 16, Ex. 5).

C. Cross-Defendants Coates, Matsuda, Cheney and Richard Dean Submit False Information to Thornton to Secure a Service Plan Amendment Increasing the District's Debt Limit from $12 to $20 million

By 2017, Balken, Trietley and Walker had all resigned from the District. In their place, Lennar caused three other, Adam Coates, Wayne Matsuda and John Cheney, to be appointed. *See, e.g.,* Ex. 18 (3/10/17 Minutes) (board on composition on March 10, 2017). Around this time, the District (still controlled by Stratus and Lennar) sought another increase in its debt ceiling, this time from $12 million to $20 million. *Id.* at 3 § C. But the District worked backwards: rather than determine whether it needed to issue extra debt, it figured out how much it could borrow to maximize developer cash. In private meetings in the summer and fall 2016, Richard Dean received an analysis from municipal underwriter D.A. Davidson that the District could borrow more than its $12 million debt ceiling. Exs. 19 (1/23/17 Email), 20 (2/22/17 Email), 21 (8/10/16 Email), 22 (10/19/16 Email). This was before anyone on behalf of the District determined whether it would be prudent to do so. When D.A. Davidson presented its findings about the District's borrowing capacity to the Board on March 10, 2017, Ex. 18 at 2 § A, the Cross-Defendants worked to artificially create costs to meet the $20 million borrowing capacity. They never considered whether such an increase was advisable, nor whether infrastructure could be constructed without further public expenditures, i.e. through increased expenditures by the developers alone. The minutes from the March 10, 2017 meeting reflect that the District began an analysis of increasing public infrastructure costs *after* it resolved to seek an increase in the debt ceiling. *Id.* at 3 § C.

Nothing in the March 10, 2017 meeting packet contains any analysis of impact or need for raising the debt ceiling, nor does it suggest any cost analysis was performed prior to that date. Ex. 23 (3/10/17 Meeting packet).

The individual Cross-Defendants knew that there were not sufficient costs to support the drastic proposed debt ceiling increase. When Coates first discussed updated cost figures with the District's attorney Barbara Vander Wall at Seter & Vander Wall to secure an $8 million increase, Coates said privately he was worried the District's justification for the increase included "double counting" of Lennar's public infrastructure costs. Ex. 24 (2/23/17 Email) at 2. He stated, "If I could explain every penny we'd be short of where you want to be and a good deal of my [i.e. Lennar's] costs aren't viable." *Id.* Indeed, Stratus and Lennar's civil engineer had prepared an Engineer's Estimate of Probable Costs on March 25, 2017 calculating public infrastructure costs at $13,923,155 — $6 million below the $20 million Lennar and Stratus desired. Ex. 25.

To concoct additional costs, Coates, Matsuda, Cheney and Richard Dean retained Ford from IDES to assist with a presentation to Thornton explaining the District's proposed cost increase. Ex. 18 at 3 (noting Coates will work with Guy Ford). Notably, Miller was not retained, even though (1) he was the engineer of record, Ex. 26 (Coates Depo.) at 84:12-15, (2) he had provided supporting documentation for the District's 2014 service plan amendment, Exs. 24.5 (transmission email to Ex. 25), 25, 27 (4/12/17 Email) & 28 (5/5/14 Service Plan Costs), and (3) Ford had no prior familiarity with the District.

Ford knew understood his assignment: "find" costs that justified the increase to $20 million. On April 19, just 12 days in advance of the May 1, 2017 deadline for the District's service plan amendment submission, Vander Wall wrote to Richard Dean and Coates and told them that Ford had conveyed that he could "reach the revised debt limit." Ex. 29 (4/19/17 Email). On April 26, Ford reiterated his strategy: "All we need to do is take the current 16M and get it over the 20M with some breathing room," he wrote in an email to Coates, Matsuda and Richard Dean. Ex. 30 (4/26/17 Email). The implication was

clear: the Lennar/Stratus controlled Board did not hire Ford to serve as an independent engineer reviewing Lennar's proposed public infrastructure costs. Rather, Ford was hired to "certify" Lennar's numbers to allow a Lennar/Stratus-controlled Board to approve issuing the maximum amount of debt that was possible per the March 10, 2017 D.A. Davidson underwriting proposal.

Given (1) Coates's concern that the District had "double counted" and (2) Miller's calculation of $13.9 million in public costs, seeking a debt ceiling increase to $20 million was a tall order. Indeed, on the eve of the submission deadline to Thornton, Ford had not completed his analysis and the District did not submit an itemized cost list with its May 1 submission. Ex. 31 (5/22/17 Email) at 82073. Three weeks later Vander Wall asked Ford when the District could would have his estimate. On May 22, 2017, Ford responded, "it is really screwed up and we really don't know if we can justify any increase, but will get [Thornton] **some bullshit estimate by the end of the week**." *Id.* at AC82071 (emphasis added).

"Bullshit" is ultimately what the District presented. Ford's May 25, 2017 report[3] — "District Engineers [sic] Evaluation And Estimate of Probable District Eligible Costs Expended and Proposed for Amber Creek Development" — calculated the District had $24,133,893.90 in costs, Ex. 32 at 1, more than $10 million above Miller's March estimate. While the report claims that Ford reviewed actual invoices, *id.* at 1, that was a lie. Lennar did not provide invoices to Ford to prepare the report, Ex. 35 (6/22/17 Email), and none of the Lennar's directors corrected this falsehood before or after the report was submitted to Thornton. Ford's calculations lacked meaningful detail. His approach was made up on the fly; he had "changed my approach about 10pm" the night before the report was finalized, and commented to Vander Wall that he "thinks this works, if not[…] were screwed." Ex. 33 (5/26/17 Email).

Thornton was not impressed. Thornton stated in a responsive letter:

> In order for City staff to recommend approval of the increased debt limitation, staff will need verifiable public improvement costs. Thank you for submitting the District Engineers Evaluation and Estimate of Probably [sic] Costs. Our engineering staff reviewed that document but could not determine how the numbers were derived and therefore could not approve the review.

[3] The Report was not actually finalized until May 26. Ex. 36.

Ex. 34 at 1. Thornton asked for more detailed cost figures by June 29. *Id.* at 2.

The Cross-Defendants then scrambled for new figures. The District could have submitted Lennar's and Stratus's actual costs. By that point, Ford estimated 79% of the public infrastructure was built and actual costs had been incurred. Ex. 32 at 1. When the District's lawyer Vander Wall suggested this approach, Coates swiftly threatened her: "I will not allow Lennar's internal information and pricing to be used to verify funds until I have reviewed and approved of the package." Ex. 35. Coates continued,

> [C]ease and desist any use of our internal information until I allow release. I am of the opinion that the presentation has or will potentially damage Lennar's interests and do not want to have the information used without our ability to comment and if need be control how the information is being used or presented to make sure we agree with the presentation, content and use."

Id. at 1-2. Coates did not want to publicize Lennar's actual cost figures because they did not reflect a drastic increase in costs. Instead, the true figures would have shown that Lennar had underreported building costs in permit applications with Thornton. Lennar, with the implicit assistance of fellow Board members and legal counsel, was defrauding both the District and Thornton simultaneously. Handwritten notes from the June 29, 2017 Board meeting make this clear; "permitted $ d/n match 5/25/17 Eng'r report," i.e. Lennar's permitted costs do not match the figures in Ford's May 25 report.[4] Ex. 37. Not a single board member pushed back on Coates's refusal to provide the District with Lennar's cost data, *see, e.g.* Ex. 38 (Matsuda Depo.) at 94:22-98:5; Ex. 39 (Cheney Depo.) at 74:21-77:17, even though the District should have obtained this information as part of due diligence under its service plan amendment and was *entitled* to this information under its agreements with Lennar. Ex. 6 at 3 § 4 (noting District entitlement to "contracts, pay requests, change orders, invoices and evidence of payment of same,"

[4] Discovery has made clear that are two sets of books for the District: handwritten notes of board meetings that have not been made part of the public record, and the typed neutered minutes drafted for public consumption. The public board minutes of the June 29 meeting omit Lennar's concern that the engineer's costs do not match the permit costs. Ex. 42. Other documents also reflect that Coates did not want to highlight the discrepancy between the District's claimed costs and the amounts Lennar had claimed in permit applications with Thornton. Notes after a June 20, 2017 telephone call reflect that "Adam [Coates] is not comfortable b/c their [Lennar's] costs don't add up to Thornton's permits. [¶] •Don't want to give #s b/c they fear increased permit costs." Ex. 43 at 55666.

before acquiring infrastructure); *Leonard v. Interquest*, -- P.3d --, 2022 COA 78 (developer records of infrastructure construction costs are public records where district has contractual right to such records).

So instead of using actual costs and invoices, Ford concocted a new set of cost figures for Thornton on June 29. Exs. 40 (6/29/17 Email) and 41 (attachment). While his original May 25 submission identified $24,133,893.90 in costs, Ex. 32, his updated submission revised that figure downward by more than $2.5 million to $21,567,819.79. Ex. 41. Further, the submissions contained drastically different figures for how much Lennar spent during each phase of construction. For instance, the May 25 submission identified $2,076,859.00 in "actual costs" in Phase One, Ex. 32 at 3, but the new submission increased that figure to $2,785,161.08. Ex. 41. The May 25 submission also identified $2,908,064.92 in Phase 3 costs, Ex. 32, but the updated submission identifies $7,119,273.94. Ex. 41. Despite these glaring inconsistencies and the serious questions they raised about the reliability Ford's data and methodology, Thornton recommended approval of the increased debt limit. When Ford received word that Thornton city staff recommended approval, he bragged to Vander Wall, "Damn I am good! **Can't believe they bought that garbage!**" (emphasis added). 44 (7/17/17 Email).[5]

D. Coates, Cheney, Matsuda and Dean Conspire to Issue Unnecessary Debt at Exorbitant Interest for Phantom Reimbursement Costs

With the debt ceiling increase secured, Coates, Matsuda, Cheney and Richard Dean embarked on issuing debt. The District issued $18,902,000 of debt on October 31, 2017 in three tranches: (1) $15,090,000 of 2017A bonds, due in two parts in 2037 and 2047 at 5% and 5.125% interest rate; (2) $2,060,000 of 2017B bonds due in 2047 at 7.75% interest rate, and (3) $1,752,000 of 2017C bonds due in 2057 at 10.625% compounding interest. Ex. 45 (D.A. Davidson Sources and Uses of Funds) at 2; Ex. 46 (Bond Projections); Ex. 47 (Final Closing Memorandum).

The debt was exorbitant. The 2017C bonds, also known as the "Junior Lien Bonds," were issued

[5] Upon receiving this email, Vander Wall did not revoke the District's submission. Instead, she invited Ford to participate at the August 22 City Council hearing so he could present his findings. Ex. 49 (7/21/17 Email). Recognizing his utility, Richard Dean specifically requested Ford's presence at the meeting. Ex. 50 (7/21/17 Email).

directly to Lennar at extreme interest rates. Ex. 47 at 4. Projections authored by underwriter D.A. Davidson anticipate that Lennar will receive $25,777,107 for these bonds, nearly 15 times their face value at an effective interest rate of 39.4%. Ex. 46 at 4. The large payout is due to the fact that the District has insufficient tax revenue to make payments on the bonds until 2034, meaning they accrue compounding interest for 17 years. *Id.* Moreover, the 2017C bonds ***did not need to be issued at all***. As of October 31, 2017 (the day the bonds were issued), the District had certified less than $4.7 million of Lennar's and Stratus's construction costs, Ex. 48 (IDES October 10, 2017 Certification), meaning the $15,090,000 of proceeds from the 2017A Bonds were more than sufficient to cover the District's outstanding obligations. Yet the District issued debt covering nearly four times the amount of its outstanding certified costs.[6] The debt was also issued before completion of the Amber Creek subdivision, resulting in higher interest rates than had the debt been delayed and issued with a mature tax base. But that would not have been in Lennar's interests, because Lennar accrues hundreds of thousands of dollars in annual interest on the 2017C Bonds. Ex. 46 at 4. (This year alone, Lennar will accrue $282,492 on the 2017C Bonds. *Id.*) Moreover, the District already had an agreement in place where Lennar accrued only 7% interest on unpaid reimbursement costs. Ex. 6. The 2017C Bonds drastically increased the District's indebtedness with no corresponding benefit. There is no conceivable explanation why the District issued the 2017C Bonds other than to line Lennar's pockets.

The exorbitant borrowing costs foisted upon the District (and exorbitant interest income accruing to Lennar) were not given any consideration by the District's fiduciaries — Coates, Cheney, Matsuda and Richard Dean. They complied with their mandate to siphon public funds to Lennar and Stratus. Under their stewardship, the District did not engage a financial advisor to help structure its 2017A and 2017B Bonds.[7] The meeting minutes approving the 2017 debt do not indicate any of these Cross-

[6] The 2017B Bonds also did not need to be issued for similar reasons. D.A. Davidson's projections show there are insufficient tax revenues to begin paying down these bonds before 2024. Ex. 46 at 3.
[7] The District did hire an advisor, North Slope Capital Advisors, to opine that the 2017C Bonds were reasonable, but North Slope did not attend any board meetings to explain its findings. Ex. 51. North Slope's written opinion does not explain its reasoning. Ex. 52 (North Slope pricing certificate). Indeed,

Defendants any questions about the structure and timing of the debt. Ex. 51 (10/10/17 Minutes). The whole process of approving more than $18,000,000 in debt took less than 32 minutes. *Id.* (noting start time of 3:02 p.m. and end time of 3:34 p.m.)

In order to get bond proceeds to Lennar and Stratus, the Board rushed to "acquire" infrastructure from Lennar and Stratus. The process was characterized by serious anomalies and an utter failure to comply with the Lennar Facilities Acquisition Agreement. Ex. 6.[8]

The board re-engaged Ford and IDES to certify Lennar's claimed costs. This hiring made sense given Ford's proven ability to conjure whatever "bullshit" was necessary in order for Lennar and Stratus to sell their "garbage" to the necessary parties. The purpose of engaging Ford and IDES was ostensibly to comply with sections 4 and 5 of the Lennar Facilities Acquisition Agreement, Ex. 6, which required both the District's engineer and accountant to review, amongst other documents, (1) as-built drawings for public improvements, (2) lien waivers from Lennar's contractors and sub-contractors, (3) warranties associated with any improvements conveyed to the District, and (4) copies of all "contracts, pay requests, change orders, [and] invoices and evidence of payment of same" before the District reimbursed Lennar. *Id.* at 3 § 4. The agreement also required an independent engineer to certify construction costs as "reasonable and comparable to the costs of similar public improvements constructed in the Denver Metropolitan Area." *Id.* at § 5. IDES engagement letter for performing cost certification work was consistent (on its face) with these requirements. Ex. 54. Under "Task 2.0," IDES stated that it would review "at a minimum" (1) "contracts and agreements," (2) "Final Pay Applications/invoices," (3)

---

it was engaged specifically to provide a favorable opinion, not perform an objective analysis. Its engagement letter states North Slope "**will** provide the necessary certification in connection with" Junior Lien Bonds and issue an opinion that "the net effective interest rate on the proposed financing does not exceed a reasonable current interest rate," and that "the issue structure, including maturities and early redemption provisions is reasonable considering the financial circumstances of the District." Ex. 53 (North Slope engagement letter) (emphasis added).

[8] Even though Lennar and Stratus "approved" this agreements while they controlled the board, they ultimately did not even comply with its minimum formalities.

"accountant spreadsheets and other accounting tracking information (if available)," (4) "invoices and evidence of payments," and (5) "acceptance notifications be [sic] accepting agencies." *Id.* at Ex. A.

Ford, however, did not actually perform this work, and the Cross-Defendants were aware of his failure to properly review Lennar's costs. With few exceptions, Lennar did not turn over invoices or contracts for Ford's review. Ex. 55 (7/18/18 Email). Instead, Lennar provided summary accounting runs that did not contain sufficient detail for Ford to make a reasoned determination that public costs had actually been incurred. Ex. 56 ("Accounting print-outs were provided instead of invoices."); Ex. 57 (9/18/17 Email). The significance of this anomaly is further explained in the accompanying report of Leah Wietholter, who also summarizes the Ford's lack of documentary justification for his certification. Declaration of Leah Wietholter, Exs. B & C. Lennar provided just enough for Ford to draft a sham report making it appear costs were reviewed and properly certified, a key step in the scheme.

A detailed analysis was critical but never performed. As Cross-Defendant Cheney testified, Lennar's expenditures often contain mixed public and private costs. Lennar's aggregate cost data does not necessarily reflect publicly-reimbursable costs. Ex. 39 at 88:17-24 ("Lennar costs figures a developer that's building infrastructure, often builds private improvements that are not eligible for reimbursement and it's very common that aggregate costs data may include items that are not publicly reimbursable. And that's why districts rely on independent engineers to sort out what's publicly reimbursable and what's private."). Coates, Matsuda, Cheney and Richard Dean concealed this deficiency. First, they approved IDES's September 2017 Draft Infrastructure Acquisition Report at a board meeting. Ex. 58 (9/29/17 Minutes). The report stated (falsely) that IDES had "review[ed]… invoices as provided by the Developer [Lennar]." Ex. 59 (IDES draft report) at 2. They repeated this lie in the 2017 bond offering, which states "IDES has reviewed expenditures for Public Improvements from May 2012 through September 2017." Ex 60 (Offering Memorandum excerpt).

On the basis of Ford's cost certification, the District purchased infrastructure from Lennar on October 4, 2017. The bill of sale, however, does not identify any particular public improvements

conveyed to the District.[9] Instead, it simply lists expenses. Ex. 61 (Bill of Sale) at 2. When asked what infrastructure was sold to the District, Cross-Defendant Frank Walker, who signed the bill of sale on behalf of Lennar, could not identify any. Ex. 62 (Walker Depo.) at 73:3-75:12, 79:19-24 ("Q. Can you identify any specific infrastructure that was sold pursuant to this bill of sale?... A. No.").

Despite these problems, Richard Dean signed a requisition request on October 31, 2017 for the District's bond trustee to transfer $3,598,432.53 to Lennar (less the $1,752,000 from the proceeds of the 2017C Bonds). Ex. 63. The money was released on the basis of Ford's cost certification report. *Id.* at 4.

Even more egregious was the District's payment of $372,331.80 to Stratus on the same day. Ex. 64 (Requisition Request). Payments from the District to Stratus for infrastructure costs were supposed to be governed by the Subordinate Facilities Acquisition Agreement. Ex. 7. That required, amongst other terms, submission of invoices to the District and review of invoices and certification by an independent engineer. *Id.* But this review never took place; IDES did not even purport to review Stratus's invoices and claimed costs. *See generally* Exs. 242 & 48. Richard Dean, Stratus's manager and owner, acknowledged as much. Ex. 3 at 54:1-69:11. Yet Richard Dean — acting as president of the District — authorized the transfer. Ex. 64. He acknowledges that he was on both sides of this transaction, as District president and Status owner. Ex. 3 at 56:1-57:5. Dean's rushed payment is obvious from the request; it contains a note "[CONFIRM WITH GENERAL COUNSEL AND ENSURE CONFORMS TO AGREEMENT REQUIREMENTS.]" Ex. 64. (That apparently never happened.)

E. Coates, Matsuda, Cheney and Richard Dean Approve Certification of Additional Phantom Costs ahead of Homeowner Takeover

Having siphoned approximately $4 million from the District for phantom costs in October 2017, Exs. 64, 63, Lennar and Stratus went for more in Spring 2018 before homeowners could take control of

[9] Oddly, the infrastructure was "sold" to the District on October 4, 2017. The bill of sale reflects that "good and valuable consideration" of $3,598,432.53 was received by Lennar. Ex. 61. But the bonds were not issued and proceeds not sent to Lennar for another 27 days.

the Board. Ford encouraged the Board to do this, warning Coates in March 2018 that "Given the situation and timing you may want to make [cost certification] a priority" Ex. 65 (3/6/18 Email).

Coates, Cheney, Matsuda and Richard Dean knew that homeowner representation on the Board would impact Lennar and Stratus's bottom line by bringing increased oversight. They actively sought to thwart it. Cheney discouraged homeowners from running, and the Board sent violation notices to homeowners for posting campaign fliers within the Amber Creek neighborhood. Carson Decl. ¶¶ 6-8. In February 2018, there was a vacancy on Amber Creek's board after James Harmon, a representative of the prior developer, resigned. Ex. 66 (Harmon Resignation). Instead of appointing a homeowner to fill the vacancy, the Stratus- and Lennar-controlled board appoint Richard Dean's son Christian. Ex. 67 (Certificate of Appointment). Christian owned no property in Amber Creek. Ex. 68 (C. Dean Depo.) at 21:4-6.

With Christian installed, the board set out to "certify" more costs so Lennar and Stratus could reap millions more in bond proceeds without interference. Yet again, the board (Coates, Cheney, Matsuda, and Richard and Christian Dean) entrusted Ford and IDES with the task of certifying Lennar's costs. And yet again, Ford and IDES came up with "garbage" and "bullshit" for public consumption: an April 2018 report certifies an additional $10,974,274.63 in Lennar's costs. Ex. 70 at 2.[10] Again, IDES did not review of any actual purchase orders, contracts or invoices. Instead, IDES used snippets of Lennar's accounting run to parrot Lennar's claimed costs, with virtually no scrutiny of the underlying data. Ex. 55 ("No invoices were reviewed by IDES, just Lennar cost ledger reports."); Wietholter Decl., Exs. B & C. This was done days before the 2018 election in which homeowners gained a majority of seats on the board. At the April 23, 2018 board meeting, the District certified $10,974,274.63 of infrastructure costs from Lennar based on Ford's sham analysis. Ex. 71 (4/23/18 Minutes) at 4.

[10] The Report has a "Draft" watermark, but it was apparently treated as final. An excerpt with a "draft" watermark was transmitted to the board's bond trustee with a requisition request in July 2018 seeking release of funds to Lennar. See Ex 72 at 4-6; Ex 73 at 4-6. The "final" version in the District's files contains metadata indicating it was created in October 2018, even though it is dated April 2018. The native will be provided to the Court upon request.

When homeowners won 3 of the 5 seats in May 2018, Stratus and Lennar continued to hide their wrongdoing. On July 30, 2018, Richard Dean (who remained on the Board) secretly signed two bond requisition requests to transfer $5,675,800 to Lennar without a public hearing. Exs. 72 & 73. This was never even discussed with new homeowner Board members. Carson Decl. ¶¶ 9-12; Rosener Decl. ¶¶ 5-8; Jones Decl. ¶¶ 5-8. In fact, Richard Dean had received a specific warning that he should not authorize payment of costs before consulting the new homeowner Board members, Ex. 74 (7/10/18 Email), but he ignored that admonition. Furthermore, just 14 days before he signed the requisition request, he was told by the District's accountant that she had not reviewed Lennar's invoices. She told Dean that she was "supposed to review the invoices associated with the 2nd certification" but was "unable to do this, as no invoices were reviewed by IDES." Ex. 55. Dean authorized payment anyway.

The fraud continued. In 2020 — after the District's former accountant and legal counsel were terminated and homeowners gained all of the seats on the Board — Lennar had the gall to submit for an *additional* $2.49 million reimbursement. Lennar's submission came with a "certification" from an "independent engineer ***retained by the District***," Manhard Consulting. Ex. 75 (8/16/19 transmission email) (emphasis added); Ex. 76 (Engineer's report). That was false; the District never retained Manhard. Rather, Lennar repeated its same tried-and-true shill. When Lennar was caught in the lie, they chalked it up to a "technical oversight." Ex. 77 (11/1/19 Letter) at 4.

Throughout Lennar and Stratus's control of Amber Creek, transparency was the exception not the norm. While in control of the District between April 16, 2014 and April 23, 2018, Lennar and Stratus held 16 board meetings at Lennar's private offices at 9781 South Meridian Drive, Englewood, CO. *See generally* Cheney Decl. Ex. B. This was illegal, as meetings must be held within 20 miles of the District, C.R.S. § 32-1-903(1), and Lennar's offices are 27 miles from the District. The board convened just two meetings outside of Lennar's private offices: a July 13, 2017 meeting with homeowners that the City of Thornton ***forced*** the board to convene, and an October 11, 2017 board meeting in Denver at the offices

of Kutak Rock, the District's bond counsel, to approve the 2017 bond issuance.[11] *See generally* Cheney Decl. Ex. B. Lennar and Stratus have failed to produce to the District documentation required under the Lennar and the Subordinate Facilities Acquisition Agreements, Exs. 6, 7 at § 4, meaning the District has no paper trail for the infrastructure it purportedly owns. The District's current manager and accountant, Wolfersberger, LLC, has never received a complete set of construction contracts, purchase orders, invoices, as-built drawings, warranties or lien waivers. Wolfersberger Decl. ¶¶ 5-9. Lennar and Stratus's directors also routinely refused to fully disclose their myriad conflicts, a fact that will be fully explored at the *Trinity* hearing.

III. PROCEDURAL BACKGROUND

Despite perpetrating a years-long fraud, Lennar and Stratus are the Plaintiffs. They filed suit against on March 19, 2021, seeking $4 million in additional "reimbursements." Compl. at 12-13.

On April 30, 2021, the District filed a Cross-Complaint and additionally named eight Lennar and Stratus employees who served on the District's board from 2014 to 2018: Lennar's Andrew Trietley, Frank Walker, Kristi Balken, Adam Coates, Wayne Matsuda and John Cheney, and Stratus's Richard and Christian Dean. The District alleged a long-standing fraud against Amber Creek and its taxpayers, and brought seven causes of action under COCCA, COCCA conspiracy, securities fraud, breach of fiduciary duty, aiding and abetting breach of fiduciary duty, civil conspiracy and declaratory relief.

On July 2, 2021, the Cross-Defendants filed a partial motion to dismiss under Rule 12(b)(1), arguing that all of the individual Cross-Defendants are immune from suit under the CGIA, and that Lennar and Stratus are entitled to derivative CGIA immunity on three of the District's claims. In support of their motion, the ten Cross-Defendants filed only one declaration: a declaration from John Cheney, a Lennar employee who served on the board from March 2017 to May 2018. Cheny Decl. ¶ 7. As outlined in the accompanying evidentiary objections, Cheney's declaration lacks foundation. Having served only from March 2017 to May 2018, Cheney cannot competently offer evidence regarding the conduct of his

[11] This meeting at Kutak's offices was also illegal, as it occurred further than 20 miles from the District.

fellow Cross-Defendants outside that time period. As a Lennar employee, Cheney also cannot competently testify on behalf of Stratus or its agents Richard and Christian Dean.

Three important exceptions to sovereign immunity for public employees exist: an individual is not entitled to sovereign immunity if they acted outside the scope of their public employment, if they acted willfully or wantonly, or if they were not a public employee. C.R.S. § 24-10-105(1). *See also id.* at § 24-10-118(2)(b). To oppose Cross-Defendants' motion, the District sought leave to take discovery to explore these exceptions. The Court granted leave at a status hearing on August 20, 2021.

The District then took depositions of the eight individual Cross-Defendants and the parties exchanged voluminous discovery.

In the interim, the District also filed a Rule 56(h) motion for partial summary judgment on September 3, 2021, arguing that *Tallman Gulch Metro. Dist. v. Natureview Dev.*, *LLC*, 399 P.3d 792, 795 (2017) barred Cross-Defendants' claims of immunity as a matter of law, because the CGIA does not apply to claims brought by a government entity against its own employees. The Court rejected this broad reading of *Tallman* in its February 11, 2022 Order, but ruled that the CGIA may not provide immunity from a claim brought by the government depending on the circumstances. Order at 3.

After several extensions to the jurisdictional discovery deadline, this response follows.

IV. LEGAL STANDARD

Where a public employee claims CGIA immunity the trial court "must resolve all issues pertaining to sovereign immunity prior to trial, including factual issues, regardless of whether those issues pertain to jurisdiction." *Martinez v. Est. of Bleck*, 379 P.3d 315, 322 (Colo. 2016); *see also Trinity Broad. of Denver v. City of Westminster*, 848 P.2d 916, 924–25 (Colo. 1993). "This may require the trial court to hold an evidentiary, or '*Trinity*,' hearing in order to determine whether immunity applies." *Martinez*, 379 P.3d at 322. The District requests such a hearing on all disputed factual issues.

V. ARGUMENT

A. The CGIA Does Not Preclude Any of the District's Claims

The CGIA grants to public employees, as an extension of the government, limited immunity. It states that "no public employee shall be liable for injuries arising out of an act or omission occurring during the performance of his or her duties and within the scope of his or her employment, unless such act or omission was willful and wanton." C.R.S. § 24-10-105(1). *See also id.* at § 24-10-118(2)(b). Thus, an individual does not benefit from CGIA immunity if (1) they were not a public employee, (2) their actions were not within the performance of their public duties or scope of their employment; or (3) their actions were willful and wanton. All three exceptions apply here.

1. None of the Individual Defendants is Entitled to Immunity

a. The CGIA does not apply where a public entity seeks compensation from employees who used their control over the public entity to benefit others

As this Court and the Court of Appeals have previously recognized, the CGIA does not expressly indicate whether its terms apply to claims by a public entity. February 11, 2022 Order; *Tallman*, 399 P.3d at 795. Amber Creek continues to assert that the CGIA should not be read to apply to tort claims a public entity brings against its own employees, a conclusion that comports with other state courts' readings of similar statutes. *See, e.g., Lefoldt v. Rentfro*, 241 So. 3d 565, 566–67 (Miss. 2017); *see also People ex rel. Harris v. Rizzo*, 214 Cal.App.4th 921, 938–39 (2013). Indeed, because of Colorado's derogation of common law governmental immunity, grants of immunity in the CGIA are strictly construed against immunity. *Tallman Gulch*, 399 P.3d at 795.

But the District recognizes the Court has not agreed with such an expansive reading. As noted in the February 11, 2022 ruling, "essentially the holding in *Tallman* is that when a public entity sues an employee, the CGIA *may not* provide immunity for the employee." Order at 3. Consistent with the February 11 Order, it is now clear that on the facts presented here, *Tallman* should apply. CGIA immunity may not apply where a metro district director acts "far outside the bounds of the district-approved service plan," and where they are sued for conduct that is primarily private in nature. *Id.* Indeed, the *Tallman* court held the CGIA inapplicable to the extent that claims were based on alleged

misrepresentations that the defendant made "while acting in his capacity as a private developer," including "representations he made to the Board in seeking approval of the bond issuance and his failure to correct Natureview's previous statements within the service plan[.]" *Id.* at 795 at n.1. The court also found the CGIA inapplicable to the breach of fiduciary duty claim arising from defendant's approval of the issuance of bonds on behalf of the District "in a financially reckless manner and in bad faith, favoring his own interests over those of the District." *Id.* at 795.

Those elements — actions outside the scope of the service plan, harmful private conduct, misrepresentations and financially reckless debt creation — are all present here. For instance, Lennar's directors Coates, Matsuda and Cheney knowingly inflated Lennar's purported construction costs to seek an increase from Thornton to the District's debt limit to $20 million. Their chosen engineer, Guy Ford, described his own work as "bullshit" and "garbage," and Coates was aware that their inflated construction figures likely represented "double counting." Coates, while acting as a Lennar employee, demanded the District's legal counsel cease and desist from attempting to verify costs with actual data. Cheney was aware that Lennar's accounting mixed both private and public costs and would need to be segregated, which they were not. This enabled the District to ultimately issue $18 million in debt, and to pay Lennar and Stratus over $10 million. They used Ford to "certify" Lennar's costs.

The Board's authorization of these payments to Lennar and Stratus on the basis of "bullshit" and "garbage" work product is far outside the bounds of the District's service plan or any related public purpose. The original service plan of the District contemplated that the District would acquire public infrastructure *pursuant to the terms of an Infrastructure Acquisition Agreement*. Ex. 78 (Service Plan) at 9-10. That Agreement, in turn, provided that the District would purchase infrastructure at the "actual cost of construction including related soft costs, but excluding Developer overhead and profit." Ex. 8 at 1-2. Subsequent infrastructure acquisition agreements with Lennar and Stratus likewise only contemplated that the developer would obtain reimbursement for certified construction costs after submission of "contracts, pay requests, change orders, invoices and evidence of payment of same… and

any other requested documentation to verify the eligible Construct Costs requested," and only if such costs were "reasonable and comparable to the costs of similar public improvements constructed in the Denver Metropolitan Area." Ex. 6 at 3, ¶¶ 4 & 5. Neither the service plan nor any of the infrastructure acquisition agreements contemplated that the District would fund *private development costs* with public funds, or that the District would pay for inflated construction costs. And neither the service plan nor any of the infrastructure acquisition agreements contemplated that Lennar or Stratus would be reimbursed without engineer and accountant review of contracts, pay requests, change orders, invoices, and evidence of payment. But the Cross-Defendants authorized payments to Lennar and Stratus with virtually no supporting documentation, a gross waste of public money. They even participated in concealing the lack of support for these payments by approving IDES's cost certification report which stated that it had reviewed Lennar's invoices.

As discussed above, the issuance of $18 million in debt was beyond reckless. The District did not have sufficient costs that required issuance of so much debt, and the premature issuance of the debt has resulted in hundreds of thousands of yearly costs to the District in excess interest payments that accrue to Lennar's benefit. The issuance of the usurious 2017C Junior Lien Bonds — which will pay to Lennar almost 15x their face value — was reckless, in bad faith, and has no conceivable public purpose.

Richard Dean unilaterally transferred money to his company Stratus from the District without any verification at all by an engineer that his costs were for infrastructure. He later secretly transferred almost $6 million to his co-developer Lennar without informing independent homeowners of his actions.

b. Cross-Defendants are Liable for Conduct Outside the Scope of their Public Employment

In any event, it is clear that the Cross-Defendants all took actions outside the scope of their public employment. As to each individual:

Andrew Trietley negotiated the purchase and sale agreement with Stratus as a private employee of Lennar, which included a provision to "control" the District. He further messaged the District's

submission to Thornton for approval of a debt ceiling increase that contained a material falsehood about the District's financial position as an employee of Lennar before he was a District director.

Kristi Balken entered into the Lennar Facilities Acquisition Agreement on behalf of Lennar (while she was a District board member). She later took a consulting engagement with Stratus and from that position negotiated with D.A. Davidson to structure the District's debt, a negotiation that ultimately lead to overleveraging the District. Exs. 19, 20; Ex. 9 at 32:7-23. (Her employment with Stratus within six months of resigning from the Board was also unlawful under C.R.S. § 24-18-105(3)).

Frank Walker sold "infrastructure" to the district on behalf of Lennar in October 2017, after which the District paid $3,598,432.53 to Lennar. Walker was not on the Board at the time of the sale.

Adam Coates and **Wayne Matsuda** worked with Guy Ford to package Lennar's private cost information for the District as Lennar employees. This information was first used to sell a "bullshit" and "garbage" proposal to Thornton to increase the District's debt ceiling, and was ultimately used by Ford to author two sham cost certification reports certifying $14 million of Lennar's "public" expenditures.

John Cheney helped negotiate the structure of the District's bonds while he was a Lennar employee. Cheney Depo. 40:8-41:7.

Richard Dean negotiated the district control agreements on behalf of Stratus that enabled private control of the District. He also met privately as a Stratus employee with D.A. Davidson to determine how to structure the District's debt to Stratus's maximum advantage. He also submitted scant cost data to the District (never reviewed by an engineer) to make it appear that Stratus had satisfied its obligations to the District before receiving "reimbursement" of public funds.

Christian Dean participated with his father Richard in a meeting with D.A. Davidson as a representative of Stratus where they determined the District could borrow additional funds. Ex. 79 (6/6/17 Email). At the time he was not a board director, and he acknowledges he and his father were there as Stratus representatives. Ex. 68 at 39:15-42:13.

Moreover, intentional torts committed against the District are not within the scope of public

employment. Whether an act falls within the "scope of employment" depends on whether "the employee's conduct was motivated by an intent to serve the employer's interests and connected to acts the employee was authorized to perform." *Stokes v. Denver Newspaper Agency, LLP*, 159 P.3d 691, 693 (Colo. App. 2006). The Supreme Court has noted that "it is accepted that it is less likely that a willful tort will properly be held to be in the course of employment," and that an act will be deemed to fall with an employee's scope of employment only "where the employee's purpose, however misguided, is wholly or in part to further the master's business." *Burlington Indus., Inc. v. Ellerth*, 524 U.S. 742, 756 (1998) (citations omitted). The Colorado Supreme Court has likewise recognized that for an intentional tort to fall within the scope of employment "the agent's intent in committing the tortious act must be to further the employer's business." *Grease Monkey Int'l, Inc. v. Montoy*a, 904 P.2d 468, 472 (Colo. 1995).

Where the plaintiff seeking relief is a third party to the employer-employee relationship the law supports vicarious liability for intentional conduct so long as employees were motivated "at least in part" by an intent to serve their employers, even if the employees also had improper motivations. *See, e.g.,* Restat. (2d) of Agency § 236 & cmt. a. However, in cases involving first party liability for breach of fiduciary duty — such as those here — it is clear that a different rule applies. An entity is not vicariously liable for its officer or directors' breach of fiduciary duty to itself. *See Arnold v. Soc'y for Sav. Bancorp, Inc*., 678 A.2d 533, 540 (Del. 1996). By extension, an intentional tort committed by a public employee against the government cannot logically be within the scope of public employment.

To underscore that the Cross-Defendants were not acting within the course and scope of their public employment, they undertook numerous actions plainly enjoined by the law and beyond their public authority. Each time the Cross-Defendants caused the District to enter into an agreement or transaction that benefitted Lennar or Stratus they violated at least two provisions of the Ethics Code. Section 24-18-109(2)(b) bars "local government officials" from "[p]erform[ing] an official act directly and substantially affecting to its economic benefit a business or other undertaking in which he either has a substantial financial interest or is engaged as counsel, consultant, representative, or agent." C.R.S. §

24-18-109(2)(b); *see also* C.R.S. § 24-18-102(5) ("local government" includes government of a special district) & (6) ("local government official" includes "an elected or appointed official of a local government"). Similarly, section 24-18-201 states that local government officials "shall not be interested in any contract made by them in their official capacity or by any body, agency, or board of which they are members or employees."[12]

Numerous actions, as explained above, were undertaken intentionally against the interests of the District, such as ratifying the Lennar and Stratus Facilities Acquisition Agreements in less than seven minutes; seeking an increase in the District's debt ceiling without any analysis of whether costs justified such an increase; submitting "garbage" and "bullshit" information to Thornton; overleveraging the District with high-interest debt; accepting public infrastructure without proper cost certification; and "purchasing" unidentifiable infrastructure.

c. Cross-Defendants' Willful and Wanton Conduct Removes Any Applicable Immunity

The CGIA also has an exception from immunity where acts are "willful and wanton." C.R.S. § 24-10-105(1) (emphasis added). Plaintiffs argue that the "willful and wanton" exception is limited to conduct involving physical injury, focusing on quotes referencing "danger" or "safety." Mot. at 9. However, the Colorado Supreme Court has already indicated that a willful and wanton finding does not require a threat of physical harm by holding that such a finding could accompany claims for wrongful discharge and tortious interference with contract. *City of Lakewood v. Brace*, 919 P.2d 231, 236 (Colo.

[12] Although the Ethics Code does not catalog all the circumstances that might render an official "interested in" a contract, the common law is replete with cases where government contracts or ordinances were voided because participating public officials were simultaneously employed by private companies benefiting from the contract or action. *See, e.g., Aldom v. Borough of Roseland*, 127 A.2d 190, 197 (N.J. App. Div. 1956) (citing cases); *Stockton Plumbing & Supply Co. v. Wheeler*, 229 P. 1020, 1024 (Cal. Ct. App. 1924) ("Cases are numerous in which it has been held that one who is an employee of another, or a corporation or firm, and at the same time a member of the city council of a municipality is ineligible as such official to make or assist in making a contract with the person or corporation in whose employment he is, and that a contract so made is void upon the principle that such act would contravene public policy") (citing cases).

1996); *see also Robinson v. City & Cnty. of Denve*r, 39 F. Supp. 2d 1257, 1264 (D. Colo. 1999) (willfully and wanton action when defendant "knowingly disregarded plaintiff's rights").

None of Cross-Defendants' cases indicate there is a physical threat requirement in the willful and wanton exception. Although two of their cases arose in that context, *see Martinez*, 379 P.3d at 317 (police officer shooting); *Gray v. Univ. of Colorado Hosp. Auth.*, 284 P.3d 191, 194 (hospital malpractice), neither case turned on that factor. Instead, both focused on the required *mens rea. See Martinez,* 379 P.3d at 318 (willful and wanton conduct is "not only negligent, but exhibit[s] *conscious disregard* for safety of others") (emphasis in the original); *Gray*, 284 P.3d at 198 (facts must support an inference that the employee was "consciously aware" that he or she was creating a risk).[13]

This focus on *intent* is consistent with the caselaw interpreting "willful and wanton" in Colorado's exemplary damages statute, which is instructive in interpreting the same phrase in the CGIA. *See Martinez*, 379 P.3d at 323. Caselaw under that provision shows that the willful and wanton standard does not turn on the type of injury but rather whether there is evidence of "conscious disregard" for the rights of others. *See Gen. Steel Domestic Sales, LLC v. Bacheller*, 291 P.3d 1, 3 & 11, *as modified* (Dec. 20, 2012); *see also W. Fire Truck, Inc. v. Emergency One, Inc.*, 134 P.3d 570, 578 (Colo. App. 2006).

As outlined above, there is ample evidence that the Cross-Defendants were consciously aware that they were acting against Amber Creek's interests. At minimum, the Court should hold a *Trinity* hearing before deciding the issue, as a determination of the absence of willful and wanton beahvior may not be made on the documentary record alone. *See L.J. v. Carricato*, 413 P.3d 1280, 1288–89 (2018) (reversible error in refusing to hold a *Trinity* hearing to determine whether defendant acted willfully and wantonly); *Duke v. Gunnison Cnty. Sheriff's Off.*, 456 P.3d 38, 45 (2019) (same).

d. Coates, Matsuda, Cheney and Christian Dean were Never Properly Qualified

[13] The final case Cross-Defendants cite, *Tatten v. City & Cnty. of Denver*, No. 16-CV-01603-RBJ-NYW, 2017 WL 5172244 (D. Colo. Feb. 3, 2017), is entirely inapposite. That case did not turn on the absence of danger or risk to safety, but instead on the fact that there could be not be a "willful and wanton" finding where the public employee performed her duties properly. *Id.* at *12.

A basic requirement of CGIA immunity is that the individual claiming immunity be a public employee. In this case, Coates, Matsuda, Cheney and Christian Dean were never properly qualified as such and thus are not entitled to CGIA immunity.

Under *Landmark Towers Ass'n, Inc. v. UMB Bank, N.A.*, 436 P.3d 1126 (Colo.App. 2016), a metro district elector may not be qualified if their property interest within the District is based on a sham agreement, as "sham contracts are without legal consequence." *Id.* at 1137*, rev'd on other grounds*, 408 P.3d 836. In that case, the Court held that held that certain developer-affiliated electors were not properly qualified because their options contracts to purchase real estate within the district were shams.

After the *Landmark* decision came out, the District's attorneys noted that the options contracts to qualify Richard Dean, Coates and Matsuda as directors were "problematic." Ex. 80 (1/11/17 Email). So Lennar substituted those options contracts with conveyances of parcels for Coates and Matsuda, and provided Cheney a parcel to qualify him to serve. *Id. See also* Ex. 81 (1/18/17 Email). (Richard Dean never substituted his options contract, Ex. 80, and his son Christian was qualified through a sham option contract in 2018. Ex. 68 at 54:17-78:4.) But the parcels conveyed to Coates, Matsuda and Cheney were as much shams as the options contracts that were originally used for qualification. None of the directors paid anything for their parcels. Coates and Matsuda could not recall where the land conveyed to them was located, and Cheney believed it was part of a parking lot. Coates and Matsuda could not testify whether they still owned the property at the time of their depositions and what had happened to their property. None of them ever paid property taxes for their parcels, and did not know who paid the property taxes. Matsuda Depo. 17:14-21:19; Cheney Depo. 41:25-45:22; Coates Depo. 34:9-37:16.

The testimony suggests Lennar retained actual possession of control of the property and that the conveyances were sham instruments. Indeed, Coates testified that the deed he was conveyed was "part of my qualification." Coates Depo. 35:8.

Because the conveyances were shams, Coates, Matsuda, Cheney and Christian Dean are not entitled to CGIA immunity.

2. Neither Lennar nor Stratus is Entitled to Protection Under the CGIA

Cross-Defendants also argue that Lennar and Stratus are entitled to derivative immunity for three of seven of Amber Creek's claims — breach of fiduciary duty, aiding and abetting breach of fiduciary duty, and declaratory relief.[14] But their argument for extending ***governmental*** immunity to ***private, for-profit corporations*** finds no support in the law. The only recognized basis for extending immunity to private companies is if they qualify as "public entities" by virtue of being either an "instrumentality" of a governmental body or "created by intergovernmental contract." *See* C.R.S. § 24-10-103(5)[15]; *see also Moran v. Standard Ins. Co.*, 187 P.3d 1162, 1165 (Colo. App. 2008). Neither applies here.

Lennar and Stratus have not (and cannot) claim to be public entities. Instead, they claim "derivative immunity" based on the alleged immunity of their employees. Mot. at 13-14. The CGIA, however, only contains one vicarious immunity provision and it is limited to *public entities* employing *public employees*. *See* C.R.S. § 24-10-106(3). Plaintiffs offer no cognizable support for extending vicarious immunity to private employers. The single case they cite, *Muniz v. Garner*, 921 F.Supp. 700 (D. Colo. 1996), is entirely inapposite. Although that case held that a private hospital was entitled to immunity under the CGIA in connection with a negligent doctor, the critical fact was that the hospital *was a public entity when the injury occurred*. *Id*. at 702. The court rejected the plaintiff's argument that the hospital lost immunity because it was subsequently privatized, holding that the hospital's right to immunity depended on its status at the time of the injury, not when the lawsuit was filed. *Id.* at 703. Nothing in the holding suggests the CGIA should be extended to cover purely private entities based on the immunity of their employees.

[14] They do not argue that Lennar and Stratus are entitled to immunity for Amber Creek's claims for COCCA, Conspiracy to violate COCCA, Securities Fraud or Civil Conspiracy.

[15] The CGIA defines "public entity" as: "the state, the judicial department of the state, any county, city and county, municipality, school district, special improvement district, and every other kind of district, agency, instrumentality, or political subdivision thereof organized pursuant to law and any separate entity created by intergovernmental contract or cooperation only between or among the state, county, city and county, municipality, school district, special improvement district, and every other kind of district, agency, instrumentality, or political subdivision thereof." C.R.S. § 24-10-103(5).

The absence of caselaw supporting Cross-Defendants' "derivative immunity" theory is unsurprising as it runs counter to the widely-adopted rule in the Second Restatement of Agency that "[t]he principal has no defense because of the fact that... the agent had an immunity from civil liability as to the act." Rest. (2d) of Agency § 217(b). As one court has explained:

> [A]n immunity from liability does not mean that a person did not commit a negligent, harmful act. It only means that for certain policy reasons liability is precluded against that person. In the interest of compensation to the victim, it should not be presumed that the immunity from liability given to the negligent person is carried over to others whom the victim can sue. Rather, the presumption should be the other way. Thus, unless the purpose of the immunity would be thwarted by carrying it over to others, suit against the others will lie.

Davis v. Harrod, 407 F.2d 1280, 1284 (D.C. Cir. 1969). *See also Monongahela Power Co. v. Buzminsky*, 850 S.E.2d 685, 694 (W. Va. 2020); *Savage v. State*, 899 P.2d 1270, 1272–73 (Wash. 1995); *Garcia v. Est. of Arribas,* 363 F. Supp. 2d 1309, 1318–19 (D. Kan. 2005) (citing cases).

Although the District has not located a Colorado case applying the Restatement rule, the existing caselaw leans towards this view. At least one Court of Appeal opinion has noted its potential application in dictum. *See Henisse v. First Transit, Inc.*, 220 P.3d 980, 988 at n.2 (Colo. App. 2009). The Court of Appeal has also applied a similar analysis to find that an employer was not entitled to the benefit of a shortened limitations period that barred a claim against its employee. *See Gallegos v. City of Monte Vista*, 976 P.2d 299, 301 (Colo. App. 1998) ("[T]he doctrine of respondeat superior imputes only the negligent acts of the employee to the employer. Thus, although a finding that an employee is not negligent requires a finding that the employer is not legally responsible, an action may proceed against an employer if the claim against the employee has been dismissed or barred, not on the merits of the claim, but on procedural grounds."). In light of the CGIA's purpose of protecting the public fisc underlined by its explicit grant of vicarious immunity to public entities, it would make no sense to extend vicarious immunity to private entities, especially if such immunity would prevent a public entity victim from receiving compensation. *See Cisneros v. Elder,* 506 P.3d 828, 832 (2022) ("In general, the CGIA serves to shield public entities from tort liability"); *Moran v. Standard Ins. Co.*, 187 P.3d 1162,

1165 (Colo. App. 2008) ("[A] central legislative purpose of the CGIA is to limit the potential liability of public entities for compensatory money damages in tort"); *Tallman Gulch*, 399 P.3d at 795 ("The statute clearly states that the purpose of the CGIA is to limit the liability of public entities in defending against tort claims, and thus to lessen the burden on taxpayers who provide funding for public entities").

In any event, Cross-Defendants' motion rests on the mistaken premise that Lennar and Stratus are being sued for actions that were taken solely by their employees. That is simply not the case. Lennar and Stratus took numerous independent actions to assist the individual Cross-Defendants to breach their fiduciary duties. That includes entering into a District Control Agreement pursuant to the terms of the purchase and sale agreement, Ex. 1 at 15; drafting submissions to the town of Thornton in 2014 to message the District's request for a service plan amendment increase its debt ceiling; submitting false and inflated costs to the District for reimbursement; selling unidentifiable infrastructure to the District and receiving the proceeds of such sham sales; and qualifying individuals for service on the Metro District board through options agreements and quitclaim deeds.

Furthermore, the District's claims for declaratory relief are clearly not subject to sovereign immunity as Lennar and Stratus are counterparties to the agreements and transactions at issue. As signatories, Lennar and Stratus stand at arms-length from the District; the District seeks declaratory relief regarding the legality of these agreements.

B. The CGIA Notice Requirement Does Not Apply

Cross-Defendants further argue that the District's claims must be dismissed because the District did not give notice to itself. Colorado law does not support such an absurd reading of the CGIA.

Under the CGIA "any person claiming to have suffered an injury by a public entity or by an employee thereof" must file a written notice, and if that "claim is against a public entity other than the state "the notice shall be filed with the governing body of the public entity or the attorney representing

the public entity." C.R.S. § 24-10-109(1) & (3)(a). The claimant may not commence the action until either the public entity denies the claim or 90 days has passed. C.R.S. § 24-10-109(6).[16]

Just this year the Colorado Supreme Court reiterated that it would not enforce a literal reading of the text of the CGIA if such a reaching would produce absurd results. *See Cisneros v. Elder*, 506 P. 3d 828, 833-34 (Colo. 2022) (construing a waiver of immunity for claims by pretrial detainees who "can show injury due to negligence" to also apply to injuries attributable to intentional torts). Enforcing strict compliance with the notice provision here — a provision enacted to *protect* entities like Amber Creek — would be absurd because it would require Amber Creek to go through a meaningless notice exercise before asserting affirmative claims for relief. Strict adherence to the CGIA's text has not been required where doing would undermine the legislation's purposes. For instance, the Colorado Supreme Court has indicated that "substantial compliance" with the notice requirement appropriately balances the interest in giving public entities adequate notice to remedy deficiencies and plan for potential liability, on the one hand, and the interest in allowing injured claimants to seek redress. *See Woodsmall v. Reg'l Transp. Dist.*, 800 P.2d 63, 69 (Colo. 1990). Interpreting the CGIA to require Amber Creek to notify itself before bringing suit against its former directors for defrauding it would disserve both of the relevant public interests discussed in *Woodsmall*. Notice would not assist Amber Creek in preparing to meet the potential fiscal burden of the claims because it seeks compensation *for* the district, not *from* it, and would also deprive it of the opportunity to redress its injuries.

C. Amber Creek Has Standing to Seek to Void the Contracts at Issue

Amber Creek's declaratory relief cause of action is unaffected by the outcome of any of the other issues raised in Plaintiffs' motion because it is based on statutes designed to prevent certain practices, not to compensate claimants, and therefore falls outside the CGIA's ambit. *See Elder v. Williams*, 477

[16] As Amber Creek has previously argued, the existence of the notice provision is strong evidence that the Legislature did not intend for the CGIA to apply to suits by public entities against their own employees. Those arguments are incorporated here by reference. *See* Amber Creek's C.R.C.P. Rule 56(h) Motion on CGIA Immunity at 6-7 & Amber Creek's Reply in Support of C.R.C.P. Rule 56(h) Motion on CGIA Immunity at 7-8.

P.3d 694, 699 (Colo. 2020).[17] Amber Creek concedes the narrow point raised in Plaintiffs' motion that it lacks standing to object under TABOR. But the TABOR violation is just one grounds for relief, and so Amber Creek's request for declaratory relief cannot be dismissed. As detailed in paragraphs 169-171 of the Cross-Complaint, all of the contracts at issue were approved by board members who had impermissible conflicts, and thus the contracts are voidable at Amber Creek's request pursuant to statute. *See* C.R.S. §§ 24-18-203 ("Every contract made in violation of any of the provisions of section 24-18-201 or 24-18-202 shall be voidable at the instance of any party to the contract except the officer interested therein."), 24-18-201(1) ("Members of the general assembly, public officers, local government officials, or employees shall not be interested in any contract made by them in their official capacity or by any body, agency, or board of which they are members or employees."), 24-18-102 ("local government" defined to include special districts). Given the Legislature's clear intent to allow parties to void contracts created in violation of the Code of Ethics, it cannot be argued that Amber Creek lacks standing to make such a request.

VI. CONCLUSION

For the foregoing reasons, Cross-Defendants' motion to dismiss under the CGIA should be denied. On any contested factual issues, the court should convene a *Trinity* hearing.

Respectfully submitted this 15th day of July, 2022.

[17] The fact that Amber Creek's declaratory relief claim seeks a return of all monies paid under the contracts to be declared void does not render the cause of action compensatory in nature. A request "to be restored to the *status quo ante* in the event [a] contract is declared void" is a request for restitution and equitable in nature, thus falling outside the scope of the CGIA. *Forest View Acres Water Dist. v. Colorado State Bd. of Land Comm'rs*, 968 P.2d 168, 173 (Colo. App. 1998).

Paul C. Rufien, P.C.

A duly signed physical copy of this Pleading is on file at the office of Paul C. Rufien, P.C., pursuant to Rule 121, Section 1-26(9), C.R.C.P.

By_____/s/_____
Paul C. Rufien

REISER LAW, P.C.

_____/s/_____
Michael J. Reiser, #16161

FERGUSON LAW PC

_____/s/_____
Sam Ferguson, Esq.

CERTIFICATE OF SERVICE

I hereby certify that on this 15th day of July, 2022, a true and correct copy of the foregoing **AMBER CREEK'S REPLY IN SUPPORT OF C.R.C.P RULE 56(H) MOTION ON CGIA IMMUNITY, WITH EXHIBITS 1 THROUGH 81,** as well as the accompanying **DECLARATIONS OF KEVIN CARSON, RAY ROSENER, CHARLES WOLFERSBERGER, AND LEAH WIETHOLTER** were sent via Colorado Court's E-Filing or placed in the United States mail, first class, postage prepaid, and properly addressed to the following:

Kathryn A. Reilly
Thomas A. Olsen
Wheeler Trigg O'Donnell LLP
370 Seventeenth Street, Suite 4500
Denver, CO 80202-5647
reilly@wtotrial.com
olsen@wtotrial.com
Counsel for Plaintiff Lennar Colorado, LLC

Jamie N. Cotter
Jacob F. Hollars
Spencer Fane, LLP
1700 Lincoln Street, Suite 2000
Denver, CO 80203
jcotter@spencerfane.com
jhollars@spencerfane.com
Counsel for Plaintiff Stratus Amber Creek, LLC

Gordon L. Vaughan
Ann B. Smith
Vaughan & DeMuro
111 S. Tejon St, Suite 545
Colorado Springs, CO 80903
Telephone: (719) 578-5550
Facsimile: (719) 578-5504
Email: gvaughan@vaughandemuro.com
asmith@vaughandemuro.com
Counsel for Cross-Defendants Richard Dean and Christian Dean

/s/ Sam Ferguson