DISTRICT COURT, JEFFERSON COUNTY, COLORADO Court Address: 100 Jefferson County Parkway Golden, CO 80401 DATE FILED: September 11, 2019 3:15 PM FILING ID: DCD776B4F74F3 CASE NUMBER: 2019CV31250	
Plaintiff: CARDEL HOMES U.S. LIMITED PARTNERSHIP, a Florida limited partnership v. **Defendant:** GREEN MOUNTAIN WATER AND SANITATION DISTRICT, a quasi-municipal corporation and political subdivision of the State of Colorado	**▲COURT USE ONLY▲**
Attorneys For Defendant: Mary Joanne Deziel Timmins, #13859 DEZIEL TIMMINS LLC 450 East 17th Avenue, Suite 210 Denver, Colorado 80203 **Telephone:** (303) 592-4500 **Facsimile:** (303) 592-4515 **E-mail:** jt@timminslaw.com	**Case Number:** 2019-CV-031250 **Division:** 2 **Courtroom**: 4B

MOTION TO DISMISS FOR LACK OF SUBJECT MATTER JURISDICTION UNDER C.R.C.P. 12(b)(1) AND FOR FAILURE TO STATE A CLAIM UNDER C.R.C.P.12(b)(5)

Defendant Green Mountain Water and Sanitation District ("Green Mountain"), through undersigned counsel, hereby files its Motion to Dismiss for Lack of Subject Matter Jurisdiction under C.R.C.P. 12(b)(1) and for Failure to State a Claim under C.R.C.P. 12(b)(5), and in support states as follows:

CERTIFICATION

Pursuant to C.R.C.P. 121, § 1-15(8), the undersigned hereby certifies that she conferred with counsel for Plaintiff regarding this Motion. Plaintiff's counsel stated that she would oppose the relief requested herein.

I. INTRODUCTION

This is one of five cases recently filed by a group of real estate developers trying to force Green Mountain to provide sanitary sewer service to their properties, which Green Mountain is not required to do, nor even permitted to do without numerous public notices and hearings, and prior approvals from the county, city, and electorate. The developers are trying to get around the public notice and hearing requirements inherent in the statutory process for setting up a sanitation district, or the statutory requirements for extending the boundaries of an existing sanitation district. A more detailed summary of the factual background of these five related cases is set forth in the Motion for Summary Judgment filed by Green Mountain in the action filed by Big Sky Metropolitan District No. 1. Case No. 2019 CV 30887.

In this case, Plaintiff Cardel Homes US Limited Partnership ("Cardel"), has no contractual, or other, legal relationship with Green Mountain, and therefore the claims fail to state claims for relief due to lack of standing, among other things. Aside from bringing breach of contract claims without contractual privity, Cardel Homes actually requests this Court to appoint a receiver to take control over the affairs of Green Mountain, a public body led by elected officials responsible to the taxpaying electorate. This request is frivolous and groundless. The U. S. Supreme Court, through a long line of cases, has prohibited the appointment of a receiver, an officer of the court, to manage the affairs of a local political subdivision, even if the subdivision is insolvent, which Green Mountain is not. This Complaint reflects the fundamental misunderstanding these developers have regarding Defendant Green Mountain's status as a governmental entity and publicly represented body. For numerous reasons set forth herein, the claims in this Complaint should be dismissed because this Court lacks subject matter jurisdiction and in the alternative because the claims fail to state a claim upon which relief can be granted.

II. MOTION TO DISMISS FOR LACK OF SUBJECT MATTER JURISDICTION UNDER C.R.C.P. 12(b)(1)

These related cases seek review by this Court of a formal Resolution adopted by the Green Mountain Board of Directors on April 9, 2019. In the Resolution, the Green Mountain Board determined that an intergovernmental agreement that had been executed by a prior Green Mountain Board of Directors in 2018 was void and needed to be terminated. The intergovernmental agreement was between Green Mountain and Big Sky Metropolitan District No. 1 ("Big Sky"), and contemplated the provision of sanitary sewer service to Big Sky.

Because Plaintiff's claims seek this Court's review of a formal Resolution adopted by the Green Mountain Board determining that an intergovernmental agreement with Big Sky was void, the claims should be dismissed for lack of subject matter jurisdiction under C.R.C.P. 12(b)(1) because Plaintiff failed to file its claims within the 28-day time limit under C.R.C.P. 106(a)(4) and (b). C.R.C.P. 106(a)(4) provides the exclusive avenue for district court review of final, quasi-judicial decisions of a local governmental body. Such claims must be filed within 28 days after the challenged decision was rendered. C.R.C.P. 106(b). If the claims are not timely filed, the district court lacks jurisdiction to hear them. See C.R.C.P. 106(b); *Danielson v. Zoning Bd. of Adjustment,* 807 P. 2d 541, 543 (Colo. 1990).

A. Exclusive Remedy – Requires Joinder of All Claims Within 28 Days.

C.R.C.P. 106(a)(4) is the exclusive remedy for determining whether a local governmental body exercising a quasi-judicial function has abused its discretion or exceeded its jurisdiction. *Consol. Case v. City of Aspen,* 2018 Colo. Dist. LEXIS 574, ¶27 (Pitkin County) ("C.R.C.P. 106(a)(4) is exclusive remedy for determining whether governmental body exercising quasi-judicial function has abused its discretion or exceeded its jurisdiction."); *Meyerstein v. City of*

Aspen, 2009 Colo. Dist. LEXIS 624, ¶15 (Pitkin County) (If governmental action is quasi-judicial, review by District Court is solely under Rule 106(a)(4)).

Moreover, all claims that effectively seek judicial review (whether framed as claims under C.R.C.P. 106(a)(4) or not) are subject to the 28-day filing deadline of C.R.C.P. 106(b). See *Bd. of County Comm'rs v. Sundheim*, 926 P.2d 545, 548 (Colo. 1996) (Complaint under Rule 106(a)(4) must include all causes of action, including constitutional and statutory claims, in a single Rule 106(a)(4) action.) See also *JJR 1, LLC v. Mt. Crested Butte*, 160 P. 3d 365 (Colo. App. 2007) (Complaint dismissed under 12(b)(1) for failure to file claims within 28-day time limit under Rule 106(b)). Thus, claims for declaratory relief under C.R.C.P. 57 that seek review of quasi-judicial decisions must be filed within 28 days. *See Tri-State Generation & Transmission Co. v. City of Thornton*, 647 P.2d 670, 676-77 (Colo. 1982) (Party may not seek review of quasi-judicial decisions indirectly through a declaratory judgment if its claim under C.R.C.P. 106(a)(4) was time barred). This is true for constitutional and statutory challenges as well. See *Powers v. Board of County Comm'rs,* 651 P. 2d 463 (Colo. App. 1982) (Petitioner's constitutional and statutory challenges must be litigated in one action governed by the time limits of C.R.C.P. 106(b)). See also *Norby v. City of Boulder,* 577 P. 2d 277 (Colo. 1978) (One challenging quasi-judicial decision of a governmental body "must prosecute all of his causes, including constitutionality, in one action, which must be brought within [28] days.")

Important public policy considerations underlie the Rule 106 time limits and exclusivity. Where aggrieved parties have been given notice and an opportunity to be heard, "it is not unfair to require that they litigate their challenge, be it constitutional or statutory, within the time limits established in Rule 106(b)." *Snyder v. Lakewood,* 542 P. 2d 371, 377 (Colo. 1975). Requiring

local governmental bodies, and their citizens, to live under a cloud of uncertainty, and protracted litigation, is not compatible with modern governmental planning. *Id.*

B. Quasi-Judicial Action.

An action is quasi-judicial, and therefore subject to exclusive review under Rule 106(a)(4), if the governmental decision adversely affects the interests of specific individuals, and the decision is reached through application of preexisting legal standards or policy considerations to present or past facts. *Cherry Hills Resort Dev. Co. v. Cherry Hills Village,* 757 P. 2d 622 (Colo. 1988); *Meyerstein, supra,* at ¶58. In the exercise of its judicial authority, it is incumbent on a governmental body to provide notice and an opportunity to be heard to those whose interests are likely to be affected by the governmental decision. *Cherry Hills, supra,* at 628.

C. Standard of Review.

When a defendant raises a challenge under Rule 12(b)(1), the plaintiff has the burden of proving jurisdiction, and the trial court may make factual findings regarding the issue. *Consol. Case v. City of Aspen,* 2018 Colo. Dist. LEXIS 574 (Pitkin County). In a 12(b)(1) analysis, the allegations in the complaint are not entitled to any presumptions in favor of the non-moving party, and the court may conduct a hearing if necessary to resolve disputed jurisdictional facts. *Trinity Broadcasting of Denver, Inc. v. City of Westminster,* 848 P. 2d 916, 924-5 (Colo. 1993). If the matter can be resolved based on undisputed facts, a trial court does not need to conduct a fact-finding hearing. *Seefried v. Hummel,* 148 P. 3d 184 (Colo. App. 2005).

Rule 106(a)(4) limits judicial review to a determination of whether the local governmental body or officer has exceeded its jurisdiction or abused its discretion, based on the evidence in the record before the body or officer. C.R.C.P. 106(a)(4)(I). A reviewing court must uphold the decision of the lower governmental body unless there is "no competent evidence in the record to

support it." *Carney v. Civil Serv. Comm'n.,* 30 P. 3d 861, 863 (Colo. App. 2001). "No competent evidence" means that the governmental body's decision is "so devoid of evidentiary support that it can only be explained as an arbitrary and capricious exercise of authority." *Id.; Board of County Comm'rs. v. O'Dell,* 920 P. 2d 48 (Colo. 1996).

D. No Subject Matter Jurisdiction over Claims in this Case.

On April 9, 2018, the Green Mountain Board of Directors adopted a Resolution ("Resolution") determining that an intergovernmental agreement with Big Sky Metropolitan District No. 1 was void and needed to be terminated. See Resolution, Complaint at Exhibit D; See Big Sky IGA, Complaint at Exhibit C. In this Complaint, Plaintiff is seeking this Court's review of the Green Mountain Board's Resolution. The adoption of the Resolution determining the Big Sky IGA was void was a quasi-judicial act of the Green Mountain Board of Directors. The Resolution affected the rights and duties of specific individuals, namely Big Sky Metropolitan District No. 1, the only other party to the IGA. The decision by the Board of Directors that the IGA was void was reached through the application of preexisting legal standards to present or past facts, including application of the Colorado Constitution and the Special District Act, among other statutes, to the terms of the IGA. *Cherry Hills Resort Dev. Co. v. Cherry Hills Village,* 757 P. 2d 622 (Colo. 1988)

Notice was given to Big Sky, the party to the IGA, and to Cardel, the Plaintiff in this case, that the IGA was being suspended and was under review for its invalidity under Colorado law. See Letter Dated September 4, 2018, to Big Sky, Cardel and others, attached hereto as **Exhibit A**. Big Sky and Cardel, through their counsel, were given the opportunity to be heard at the Regular Meeting of the Board of Directors of Green Mountain Water and Sanitation District on January 8, 2019. Minutes of Regular Meeting, at p. 3 "Public Comment," attached hereto as

Exhibit B. Public notice of the April 9, 2019 Regular Meeting of the Green Mountain Water and Sanitation District was posted as required under the Special District Act. See Notice of Regular Meeting, dated April 9, 2019, attached hereto as **Exhibit C**. The Resolution was adopted at a public meeting, after public notice, at which all members of the public were given an opportunity to be heard regarding the termination of the IGA. See Minutes of Regular Meeting of the Board of Directors of Green Mountain Water and Sanitation District, dated April 9, 2019, attached as **Exhibit D.**

Therefore, Cardel's exclusive remedy for review of the Board's Resolution is C.R.C.P. 106(a)(4), and Cardel was required to join all its claims in the Rule 106 action, within the 28-day time limit set forth in Rule 106(b), or by May 7, 2019. Cardel failed to file its Complaint within the 28-day time limit under Rule 106(b) and therefore, this case is jurisdictionally barred and should be dismissed for lack of subject matter jurisdiction under C.R.C.P. 12(b)(1).

III. DISMISSAL FOR FAILURE TO STATE A CLAIM

The claims in the Complaint are dismissible on other grounds as set forth below.

A. First Claim for Relief (Declaratory Judgment) Dismissible Under Rule 12(b)(1) For Lack of Standing

In its First Claim for Relief, Cardel seeks a declaration by this Court that, "Cardel is a third-party beneficiary of the Big Sky/Green Mountain IGA." Complaint at ¶59. Cardel also seeks a declaration that "Green Mountain is obligated to provide sanitary sewer service" to Cardel properties because Cardel is a third-party beneficiary of the Big Sky IGA, and because Cardel received the "Will Serve Letter" attached to the Complaint at Exhibit A ("Cardel Will Serve Letter.") Complaint at ¶59 and Exhibit A. Cardel also seeks a declaration that it is a third-party beneficiary under the Green Mountain/Fossil Ridge IGA. Complaint at ¶59.

1. Cardel Lacks Standing to Sue Under Rule 57 Because It Is Not A Party, or Third-Party Beneficiary, to any Contracts with Green Mountain, as a Matter of Law.

C.R.C.P. 57(b) states:

> Any person interested under a deed, will, written contract, or other writings constituting a contract, or whose rights, status, or other legal relations are affected by a statute, municipal ordinance, contract, or franchise, may have determined any question of construction or validity arising under the instrument, statute, ordinance, contract, or franchise and obtain a declaration of rights, status, or other legal relations thereunder.

To have standing to bring an action under Rule 57, a person must show it is "interested" under a contract, or has other "legal relations" that are affected by such contract. *Associated Master Barbers v. Journeyman Barbers, etc.*, 258 P. 2d 599 (Colo. 1955). A plaintiff who is not a party to a contract is without standing to obtain a declaratory judgment interpreting, or determining the validity of, the contract. *Id.* See also *Wibby v. Boulder County Bd.*, 409 P. 3d 516 (Colo. App. 2016) (Rule 57 action dismissed under Rule 12(b)(1) for lack of standing).

a. Cardel Not a Third-Party Beneficiary to Either IGA.

Cardel does not dispute that it is not a party to the Big Sky IGA or the Fossil Ridge IGA. Cardel claims rights under the IGAs as a third-party beneficiary. Complaint at ¶58.

Under Colorado law a "person not a party to an express contract may bring an action on such contract if the parties to the agreement intended to benefit the non-party, provided that the benefit claimed is a direct and not merely an incidental benefit of the contract." *E. B. Roberts Constr. Co. v. Concrete Contractors, Inc.*, 704 P. 2d 859, 865 (Colo. 1985). A third-party beneficiary to a contract may generally sue to enforce its terms. *Bewley v. Semler,* 432 P. 3d 582, 587 (Colo. 2018). The key question in determining the status of a party as a third-party beneficiary is the intent of the parties to the actual contract. *Concrete Contractors, Inc. v. E.B. Roberts Constr. Co.*, 664 P. 2d 722, 725 (Colo. App. 1983).

Paragraph 12.4 of the Big Sky IGA, and paragraph 12.4 of the Fossil Ridge IGA, titled "No Third-Party Beneficiaries," state: "No third-party beneficiary rights are created in favor of any person not a Party to this Agreement." See Big Sky IGA at ¶12.4 attached to Complaint as Exhibit C. See Fossil Ridge IGA attached hereto as **Exhibit J.**[1] Therefore, the parties to the Big Sky IGA and Fossil Ridge IGA explicitly disclaimed any intent to confer a benefit on any third party via the Big Sky IGA or the Fossil Ridge IGA. As a matter of law, Cardel is not a third-party beneficiary under either IGA, and does not have standing to obtain a declaratory judgment interpreting, or determining the validity of, the IGAs.

b. Cardel Will Serve Letter is Not a Contract

Cardel further seeks a declaration that "Green Mountain is obligated to provide sanitary sewer service to the Cardel Property" under the Cardel Will Serve Letter, attached to the Complaint as Exhibit A. Complaint at ¶¶58 and 59.

An offer is the manifestation of willingness to enter into a bargain, so made as to justify another person in understanding that his assent to that bargain is invited and will conclude the contract. *Sumerel v. Goodyear Tire & Rubber Co.*, 232 P. 3d 128, 133 (Colo. App. 2009). In the case of an offer for a unilateral contract (an offer which requires return performance rather than a promise to perform), the offer is accepted when substantial performance has been rendered by the offeree. *Sigrist v. Century 21 Corp.,* 519 P. 2d 362, 363 (Colo. App. 1973). A condition precedent is a condition which must be performed before the agreement of the parties will become a binding contract. 17A C.J.S. §450. There is no contract if the offer is not accepted in accordance with the terms of the offer. *Extreme Const. Co. v. RCG Glenwood, LLC,* 310 P. 3d

[1] If a document is referred to in the complaint and is central to the plaintiff's claims, the defendant may submit a copy to the court attached to its motion to dismiss, and the court's consideration of the document does not require conversion of the motion to one for summary judgment. *Yadon v. Lowry,* 126 P. 3d 332, 336 (Colo. App. 2005).

246, 254 (Colo. App. 2012). A "will serve letter" issued by a sanitation district, which contains conditions precedent to provision of sewer service, is not a binding contract and is, at most, an offer for a unilateral contract, which requires return performance of the conditions precedent to become binding. *Alf Equinox Todd Creek Vill. N. v. Todd*, 2014 Colo. Dist. LEXIS 2584 (Weld County) *5 (Will serve letter from sanitation district is an offer to provide sewer service, and not a binding contract to receive sewer service).

As can be seen by the language in the Cardel Will Serve Letter, the provision of any sanitary sewer service by Green Mountain was "conditioned upon the requirements of this willingness to serve letter." See Cardel Will Serve Letter at p. 1, attached to Complaint as Exhibit 1. The Cardel Will Serve Letter contains 15 conditions which needed to be satisfied including that "an agreement between Cardel and GMWSD related to sewer service" needed to be negotiated (¶7), "approval from the City of Lakewood, the Town of Morrison and/or Mount Carbon" needed to be obtained (¶5), a "lift station" needed to be designed and built (¶9), "collection and trunk sewer" lines needed to be designed (¶10), among numerous other conditions contained in the Will Serve Letter. In the Complaint, Cardel acknowledges that these conditions needed to be satisfied. See, for example, Complaint at ¶40 (The Will Serve Letter "contemplated" that Cardel would need to use the lift station). It is undisputed that Cardel did not perform the conditions in the Will Serve Letter. In addition, Cardel does not allege that any of these conditions have been performed, as required to state a claim under C.R.C.P. 9(c). As a matter of law, the Cardel Will Serve Letter is not a biding contract, and therefore, Cardel does not have standing under Rule 57 to obtain declaratory relief as to the interpretation of the Cardel Will Serve Letter. *Alf Equinox Todd Creek Vill. N. v. Todd*, 2014 Colo. Dist. LEXIS 2584 (Weld County) *5 (Will serve letter from sanitation district is not a binding contract to receive sewer

service). *Wibby v. Boulder County Bd.*, 409 P. 3d 516 (Colo. App. 2016) (Rule 57 action dismissed under Rule 12(b)(1) for lack of standing).

Therefore, Cardel lacks standing to seek declaratory relief under Rule 57 based on the IGAs or the Will Serve Letter because it has no rights under the IGAs or the Will Serve Letter either as a party or a third-party beneficiary, and the First Claim for Relief must be dismissed under Rule 12(b)(1) for lack of standing.

2. Dismissal Under Rule 12(b)(5) Failure to Join Indispensible Parties

Rule 57(f), C.R.C.P. provides that the court may refuse to render or enter a declaratory judgment or decree where such judgment would not terminate the uncertainty or controversy giving rise to the proceeding. C.R.C.P. 57(f). Rule 57(j) provides that when declaratory relief is sought, "all persons shall be made parties who have or claim any interest which would be affected by the declaration. . . ." C.R.C.P. 57(j). Courts have held that failure of a Rule 57 action to join all parties who would be affected by the declaratory relief requires dismissal of the action for failure to state a claim. *People ex rel. Inter-Church Temperance Movement v. Baker,* 297 P. 2d 273 (Colo. 1956); *Ahern v. Baker,* 366 P. 2d 366 (Colo. 1961).

In this case, Cardel seeks a declaration that Cardel is a third-party beneficiary of the Big Sky/Green Mountain IGA and the Green Mountain/Fossil Ridge IGA, and that "Green Mountain is obligated to provide sanitary sewer service" under such IGAs. Complaint at ¶59. A declaration of rights under the IGAs requires joinder of Big Sky and Fossil Ridge to this action because Big Sky is a party to the Big Sky IGA and Fossil Ridge is a party to the Fossil Ridge IGA. Because the Complaint failed to join Big Sky and Fossil Ridge, the Rule 57 action must be dismissed. *People ex rel. Inter-Church Temperance Movement v. Baker,* 297 P. 2d 273 (Colo. 1956) (Judgment of dismissal affirmed because Rule 57 action failed to join all

interested parties); *Ahern v. Baker*, 366 P. 2d 366 (Colo. 1961) (Dismissal of Rule 57 action for failure to join interested parties affirmed).

B. Second Claim for Relief (Breach of Contract) Fails to State a Claim

In its Second Claim for Relief, Cardel alleges that Green Mountain is obligated to provide sanitary sewer service to Cardel under the Big Sky IGA, the Fossil Ridge IGA and the Cardel Will Serve Letter. Complaint at ¶63. Cardel seeks "orders declaring that it is a direct and/or third-party beneficiary of the agreements," and damages to be proven at trial. Complaint at ¶¶70 and 71.

To the extent Cardel seeks declaratory relief in its Second Claim for Relief, it lacks standing to do so as discussed above, and this Court lack jurisdiction as discussed above. To the extent Cardel alleges breach of contract claims under the IGAs, it fails to state a claim for relief because Cardel admits it does not have privity of contract with Green Mountain under either of the IGAs. Moreover, Cardel is not a third-party beneficiary as a matter of law because Paragraph 12.4 of the Big Sky IGA, and paragraph 12.4 of the Fossil Ridge IGA, titled "No Third-Party Beneficiaries," state: "No third-party beneficiary rights are created in favor of any person not a Party to this Agreement." See Big Sky IGA at ¶12.4 attached to Complaint as Exhibit C. See Fossil Ridge IGA attached hereto as **Exhibit J.** Therefore, the parties to the Big Sky IGA and Fossil Ridge IGA explicitly disclaimed any intent to confer a benefit on any third party via the Big Sky IGA or the Fossil Ridge IGA.

To the extent Cardel alleges a breach of contract claim under the Cardel Will Serve Letter, Cardel fails to state a claim because the Will Serve Letter is not a binding contract, as set forth above. *Alf Equinox Todd Creek Vill. N. v. Todd,* 2014 Colo. Dist. LEXIS 2584 (Weld County) *5 (Will serve letter from sanitation district is not a binding contract to receive sewer service).

C. Third Claim for Relief (Promissory Estoppel) Fails to State a Claim

In its Third Claim for Relief, Cardel asserts a claim for promissory estoppel based on promises Green Mountain allegedly made to Cardel in the Cardel Will Serve Letter. Complaint at ¶73.

The elements of promissory estoppel are: (1) the promisor made a promise to the promisee; (2) the promisor should reasonably have expected that the promise would induce action or forbearance by the promisee; (3) the promisee in fact reasonably relied to the promisee's detriment; and (4) the promise must be enforced to prevent injustice. *Patzer v. City of Loveland,* 80 P. 3d 908, 911 (Colo. App. 2003). A promise is a "manifestation of an intention to act or refrain from acting in a specified way, so made as to justify a promisee in understanding that a commitment has been made. *G&A Land, LLC v. City of Brighton,* 233 P. 3d 701, 702 (Colo. App. 2010). The promise, whether stated in words or inferred, must be sufficiently definite to allow a court to understand the nature of the obligation to perform. *Id.* Communications which contemplate future negotiations and do not contain language promising to be bound by a current plan, do not constitute a "promise" for purposes of the promissory estoppel doctrine. *Id.*

The Cardel Will Serve Letter does not constitute a "promise" for purposes of the promissory estoppel doctrine. At most, the Will Serve Letter is an offer of a unilateral contract, which would have required acceptance by Cardel after completion of the 15 conditions precedent set forth in the Will Serve Letter. *Alf Equinox Todd Creek Vill. N. v. Todd,* 2014 Colo. Dist. LEXIS 2584 (Weld County) *5 (Will serve letter from sanitation district is not a binding contract to receive sewer service). An offer is not an enforceable promise as a matter of law. *G&A Land, LLC v. City of Brighton,* 233 p. 3d 701, 704 (Colo. App. 2010) (City of Brighton "Notice of Intent" letter offering to purchase plaintiff's property is not a formal commitment, and therefore

not a "promise" for promissory estoppel.) In addition, the Cardel Will Serve Letter did not create an obligation, and contemplated future communications and negotiations regarding numerous topics. See *City of Brighton, supra,* 233 P. 3d at 703 (Promissory estoppel claim dismissed because City's announced plans to acquire property, and its offer to do so, did not create obligation and contemplated future negotiations and communications.)

Furthermore, Cardel's alleged "detrimental reliance" damages of "lost profits" are not recoverable as a matter of law. Cardel alleges that it detrimentally relied on the Cardel Will Serve Letter by incurring "lost opportunity and lost profits damages." Complaint at ¶¶54 and 55. Lost profits, and lost opportunities, are not recoverable under a theory of promissory estoppel; a plaintiff may only recover reliance damages. *Fretz Constr. Co. v. Southern Nat'l Bank,* 626 S.W. 2d 478 (Tex. 1981).

D. Fourth Claim For Relief (Appointment of Receiver) Fails to State a Claim

In its Fourth Claim for Relief, Cardel seeks the appoint of a receiver "to preserve the resources of Green Mountain," and control the property of Green Mountain as provided pursuant to C.R.C.P. 66. Complaint at ¶78; C.R.C.P. 66.

A receiver is an officer of the court and, upon appointment, becomes vested with the extensive power to control the finances, tax levies, and administration of the affairs of the organization that is the subject of the receivership. *Enterprise v. State,* 69 P. 2d 953 (Ore. 1937). A receiver is not permitted to be appointed to take over and administer the affairs of a public corporation because of the political nature of the body and the fact that a court, through its officer, is not permitted to exercise the power of taxation and legislation. *Id.* Therefore, through a long line of cases, the U. S. Supreme Court has held that neither a federal nor a state court possesses the power to appoint a receiver for a local political subdivision of the state, even if the subdivision

is insolvent. *Enterprise v. State, supra,* 69 P. 2d at 956; *Thompson v. Allen County,* 115 U.S. 550 (1885) (The power of taxation is the highest attribute of sovereignty, exercised by legislative authority only, and a power that has not been extended to the judiciary); *Yost v. Dallas County,* 236 U.S. 50 (1915) (Courts are not authorized to appoint receiver over local governmental body). See also *State ex rel. Lynch v. District Court McKinley County,* 73 P. 2d 333 (N. Mex. 1937) (District Court exceeded its jurisdiction in appointing receiver over town of Gallup).

Cardel's claim for appointment of a receiver under C.R.C.P. 66 fails to state a claim and should be dismissed.

IV. CONCLUSION

For the reasons set forth above, Plaintiff's claims should be dismissed for lack of jurisdiction under C.R.C.P. 12(b)(1). In the alternative, Plaintiff's claims should be dismissed for failure to state a claim under C.R.C.P. 12(b)(5).

Dated this 11th day of September, 2019

DEZIEL TIMMINS LLC
/s/ Mary Joanne Deziel Timmins
Mary Joanne Deziel Timmins #13859
Attorneys for Defendant Green Mountain Water and Sanitation District

CERTIFICATE OF SERVICE

I certify that, on September 11, 2019, a true and correct copy of the foregoing was served on the following via the Colorado Courts E-Filing System and/or by email:

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