District Court, Jefferson County, Colorado 100 Jefferson County Parkway Golden, Colorado 80401-6002	DATE FILED: August 19, 2021 2:48 PM CASE NUMBER: 2019CV30887
Plaintiff: **BIG SKY METROPOLITAN DISTRICT NO. 1**; Plaintiff: **CDN RED ROCKS, LP**; Plaintiff: **STREAM REALTY ACQUISITIONS, LLC 1**; Plaintiff: **THREE DINOS LLC**; Plaintiff: **CARDEL HOMES US LIMITED PARTNERSHIP**; and v. Defendant: **GREEN MOUNTAIN WATER AND SANITATION DISTRICT**.	▲COURT USE ONLY▲ **Case Number:** 19CV30887 19CV31158 19CV31172 19CV31185 19CV31250 **Division:** 2 **Courtroom:** 420
ORDER: RESPONSES TO ORDER OF MAY 6, 2021	

THIS MATTER comes before the Court to address standing as per the Court's order of May 6, 2021. Plaintiff Stream Realty Acquisition LLC, Plaintiff Cardel Homes U.S. Limited Partnership, Plaintiff CDN Red Rocks, LP, and Plaintiff Three Dinos each filed briefs on June 4, 2021. The Court **DENIES** CDN's Motion for Leave to File Surreply of July 12, 2021, and Big Sky's Motion for Extension of Time of July 13, 2021. After reviewing the briefs, case file, and applicable law, the Court **FINDS** and **ORDERS** as follows:

I. BACKGROUND

This case revolves around an Intergovernmental Agreement ("IGA") formed between Big Sky and Green Mountain.

In the fall of 2014, the parties allegedly negotiated for Big Sky to develop sanitary sewer services through Green Mountain as part of a development plan within Big Sky's boundaries,

resulting in a "will serve" letter on September 8, 2015 and a Memorandum of Understanding on August 31, 2015.[1]

On May 8, 2018, the parties entered into a IGA for Green Mountain to transport Big Sky's waste to Denver.[2] Green Mountain entered into the IGA by vote of its board of directors.[3] Later that day, Green Mountain held an election which replaced the board with three new board of directors.[4] The new board reversed Green Mountain's position on the IGA on April 9, 2019 by enacting a resolution declaring the IGA invalid.[5]

As a result, and on June 6, 2019, Big Sky filed a complaint, claiming breach of contract, breach of covenant of good faith and fair dealing, violation of the Colorado Constitution's prohibition on retrospective laws, and promissory estoppel.[6]

After Big Sky filed its complaint, Plaintiffs CDN Red Rocks, LP; Stream Reality Acquisition, LLC; Three Dinos, LLC; and Cardel Homes U.S. Limited Partnership ("the Developers") each filed their own complaints seeking relief, claiming they were impacted by Green Mountain's invalidation of the IGA because each had made development plans based on the IGA.[7] On January 6, 2020, the Court ordered the cases consolidated under 19CV30887.

On October 26, 2020, the Court addressed Green Mountain's motions to dismiss the Developers for lack of standing as third-party beneficiaries.[8] The Court found sufficient allegations of facts establishing the Developers as plausible third-party beneficiaries.[9]

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[1] Compl. ¶¶ 24-25.

[2] Compl. ¶ 44; Resp. Ex. A.

[3] Comp. ¶ 42.

[4] Compl. ¶ 48.

[5] Comp. ¶ 69.

[6] Compl. pp. 12-16.

[7] *See* 19CV31158, 19CV31172, 19CV31185, and 19CV31250.

[8] Order, Oct. 26, 2020.

[9] *Id.* p. 3-5.

II. ANALYSIS

A. STANDING

Each of the parties asserts standing based on the promissory estoppel or injuries stemming from promises by Green Mountain according to the will serve letter of September 8, 2015, a Memorandum of Understanding on August 31, 2015, and the claims based on vested rights stemming from the IGA, or other promises related to the subject matter of the IGA.[10]

1. Legal Standard for Standing

"Because standing is a jurisdictional prerequisite to a case going forward, we must address it first… 'A court does not have jurisdiction over a case unless a plaintiff has standing to bring it.'" [11]

Standing requires a plaintiff to demonstrate (1) that the plaintiff suffered injury in fact, and (2) that the injury was to a legally protected interest.[12] The alleged injury-in-fact must be "sufficiently direct and palpable to allow a court to say with fair assurance that there is an actual controversy proper for judicial resolution."[13]

An alleged injury-in-fact may be tangible or intangible, but an injury that that overlays as "indirect and incidental" to the defendant's action will not establish standing.[14]

2. Application

In relation to the Developers alleged claims of standing, Big Sky—as a primary signatory of the IGA—also had a promissory estoppel claim, and the Court dismissed the claim because claims of quantum meruit cannot receive recovery for a void contract under the Local Government Budget Law ("LGBL") when contracting with a government entity.[15]

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[10] CDN Resp. pp. 22-25; Three Dinos Resp. p. 13; Cardell Homes, Resp. pp. 2-9; Stream Reality p .6.

[11] *TABOR Found. v. Colo. Dep't of HCPF,* 2020 COA 156 ¶ 8.

[12] *TABOR Found. v. Colo. Dep't of HCPF*, 2020 COA 156 ¶ 9.

[13] *PSCO v. Trigen-Nations Energy*, 982 P.2d 316, 324 (Colo. 1999).

[14] *Barber v. Ritter*, 196 P.3d 238, 245-46 (Colo. 2008).

[15] § 29-1-102 (1), C.R.S.; *Falcon Broadband, Inc. v. Banning Lewis Ranch Metro. Dist. No. 1*, 474 P.3d 1231, 1242 (Colo. App. 2018).

Specifically—as stated in the Court's Order of May 6, 2021—promissory estoppel is a quasi-contractual cause of action for a party who relied on a promise from another not contained in a contract.[16] A promissory estoppel claim has four elements:

1) a promise;

2) that the promisor reasonably should have expected would induce action or forbearance by the promisee or a third party;

3) on which the promisee or third party reasonably and detrimentally relied; and

4) that must be enforced in order to prevent injustice.[17]

Proving these elements turns a promise into a binding and enforceable agreement under normal contract law remedies.[18]

Regarding a void contract under § 29-1-102, C.R.S. "a party contracting with a governmental entity has the duty to ascertain whether the contract complies with the constitution, statutes, charters, and ordinances so far as they are applicable."[19] The party contracting with the government bears the risk of being denied all recovery for a void contract, including recovery for promissory estoppel.[20]

No matter what types of costs or vested interests the Developers incurred based on alleged promises, the standard for contracts voided by the LGBL is strict: "the party contracting with a governmental entity bears the risk that 'all recovery, including quantum meruit, [will be] denied' if the contract isn't valid.'"[21] "This rule can produce 'harsh results,' but it protects the taxpayers against improper expenditures."[22]

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[16] *Pinnacol Assurance v. Hoff*, 375 P.3d 1214, 1221 (Colo. 2016).

[17] *Id.*

[18] *Id.*

[19] *Falcon Broadband, Inc.,* 474 P.3d at 1242 (citations omitted).

[20] *Id.* (citing *Normandy Estates Metro. Recreation Dist. v. Normandy Estates, Ltd.*, 553 P.2d 386, 388–89 (1976)).

[21] *Falcon Broadband*, 474 P.3d at 1242 (citing *Normandy Estates*, 553 P.2d at 390).

[22] *Falcon Broadband, Inc.*, 474 P.3d at 1242.

In their current briefs, the Developers did not address whether their claims as third-party beneficiaries are denied as part of the void the IGA. Rather, the parties allege claims stemming from the will serve letter of September 8, 2015, an MOU of August 31, 2015, and other alleged assurances which established sewer services, property rights, service agreements, and other promises.[23] However, all such alleged obligations were conditional upon developments made between Big Sky and Green Mountain, i.e. were assurances to form and follow from the ultimate agreements made in the IGA.[24] Such claims are barred for "all recovery" under a policy of "harsh results" because the third-party benefits are incidental to contractual obligations with a government entity.[25]

Therefore, the Court finds the Developers have no injury to a legally protected interest proper for judicial resolution because they are incidental to the IGA and barred from recovery due to the IGA being void.[26]

B. Contract Interpretation

The parties allege the Court's Order of May 6, 2021 misinterprets the IGA, and the Court has reviewed their arguments as a matter of record. The Court is unpersuaded.

First, as to the Court's ruling on the IGA, contract interpretation is a question of law.[27] The Court interprets the contract according to the language within the four corners of the contract itself.[28] Even if the parties differ on the interpretation of a contract, such disagreement does not establish ambiguity *per se*.[29] Only when an ambiguity arises will the Court admit extraneous evidence to show the parties intentions.[30]

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[23] CDN Resp. pp. 22-25; Three Dinos Resp. p. 13; Cardell Homes, Resp. pp. 2-9; Stream Reality p .6.

[24] *See e.g.* CDN, Compl. ¶24; Three Dinos, Compl. ¶¶ 9-10; Cardell Homes, Compl. ¶¶25-26.; Stream Reality, Compl. ¶ 36.

[25] § 29-1-102 (1), C.R.S.; *Falcon Broadband, Inc.,* 474 P.3d at 1242.

[26] Barber v. Ritter, 196 P.3d 238, 245–46 (Colo. 2008); *PSCO v. Trigen-Nations Energy*, 982 P.2d 316, 324 (Colo. 1999).

[27] *Fed. Deposit Ins. Corp. v. Fisher*, 292 P.3d 934, 937 (Colo. 2013).

[28] *Ad Two, Inc. v. City & Cty. of Denver ex rel. Manager of Aviation,* 9 P.3d 373, 376 (Colo. 2000); *see USI Properties E., Inc. v. Simpson*, 938 P.2d 168, 173 (Colo. 1997); *see also Bd. of Cty. Comm'rs of Adams Cty. v. City & Cty. of Denver*, 40 P.3d 25, 29 (Colo. App. 2001) (applying general contract interpretation law to IGA).

[29] *Ad Two, Inc.*, 9 P.3d at 376.

[30] *Ad Two, Inc.*, 9 P.3d at 376.

The Court determined the contract violated LGBL and TABOR because the plain language included clauses like the following:

> 2.7 Cost Recovery…. [A]s a condition precedent to Green Mountain accepting Wastewater from any properties in the Big Sky Service Area or the Big Sky Potential Expanded Service Area…the property owner(s) and/or a title 32 special district of appropriate jurisdiction must enter into an agreement with Big Sky providing for: (1) **equitable and proportionate cost recovery for all costs related to the construction and installation of the Big Sky Sewer System and bringing it into service, including without limitation…the associated liftstation(s), flow equalization, and force main(s) that will be owned and maintained by Green Mountain**.[31]

Although the Developers disagree with the Court's interpretation, that does not alter the Court's determinations. Under the law, it is the Court—not the parties—who has the authority to make the final interpretation of an unambiguous contract. And if the Court made mention of affidavits or outside evidence,[32] it did so in review of the evidence according to the standards of summary judgment. In sum, the Court stands by its interpretation based on the plain and unambiguous language of the IGA.

Second, the Developer's arguments amount to motions to reconsider or requests seeking similar relief from the Court. However, if the Court finds they lack standing, its not clear that the Developers would not have grounds to make such motions, and thus the Court could not consider any arguments outside of the issue of standing.

As such, the Court stands by its Order of May 6, 2021.

C. Dismissal of Claims

The parties expressed concerns regarding their procedural rights for the dismissal of the breach of contract claims. The Court recognizes that it may have unartfully implied what should have been stated explicitly. To be sure, the Court had no intention of denying the Developer's abilities to address the potential dismissal of their claims.[33]

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[31] IGA, § 2.7 Cost Recovery.

[32] *See* CDN Resp. p. 14.

[33] The parties claim the Court "appears to have made its decision" and "sown confusion" because the Court vacated the Developer's trial. *See* Cardell Homes, Resp. p. 10; CDN's Resp. p, 19. The trial dates were vacated due to clerical

Rather, the Court has suffered effects from the COVID pandemic as much the rest of society. The Court is currently operating with reduced staff while handling a backlog of cases for a docket of approximately 250 cases. The First Judicial District itself was one of the few districts to continue to hold trials during the shutdowns, and yet the District still has a backlog of approximately 900 trials.

Under these circumstances, judicial economy has become an imperative for the Court. Thus, the Court must sacrifice certain formalities that it perhaps would not do so pre-COVID. Accordingly, the Court decided to forgo setting briefing schedules or setting a hearing to address the somewhat apparent proposition that a voided contract eliminates a claim of the contract being breach—i.e. one cannot breach what does not exist.

What the Court may not have indicated clearly enough was that the Court still intended to hear the Developers on exactly which claims held by which Developers were affected by the voiding of the IGA. Hence, the Court made a general statement under the context of discussing the IGA to alert the parties that, should the Developers show they have standing, the Court would then immediately proceed to address which claims would be dismissed and permit the Developers to exercise their procedural rights to argue the issue to the Court.

To clarify the record, the Court amends its Order of May 6, 2021 according to the reasoning stated above, and **ORDERS** that had the Developers maintained standing, they reserved the right to be heard or present briefs as to which claims were dismissed by the Court's ruling of May 6, 2021, and none of their claims were dismissed in effect until after they could exercise this right.

With that said, also implicit in the Court's Order was that the issue of dismissal of breach of contract is moot if the parties lack standing. Hence, the Court choose to immediately address standing to preserve time and resources. Thus, with the incorporations made to the Order of May 6, 2021, the Court stands by its ruling.

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error by the law clerk (*see* ROA), who intended to vacate the trial related to Big Sky, not understanding that there were two trials set. However, the claims of confusion or implied prejudice strikes the Court as disingenuous because the error was noticed immediately, the Developer's trial dates were placed back on the Court's docket, and the trial has remained on the schedule up until the time of this order. Furthermore, the "confusion" could have been remedied by contacting the Court's staff for clarification at any time.

III. CONCLUSION

The Court incorporates these rulings into its Order of May 6, 2021. For the reasons stated above, the Court finds the Developers lack standing against Green Mountain. The Court **DISMISSES** them as parties to the case. With no remaining plaintiffs in this action, the Court **DISMISSES** this case and the cases brought by the Developers.

SO ORDERED in Golden, Colorado on August 19, 2021.

BY THE COURT:

Jason D. Carrithers
District Court Judge