COLORADO COURT OF APPEALS 2 East 14th Avenue Denver, Colorado 80203	
Boulder County District Court The Honorable Nancy W. Salomone Case No. 17CV30818	
Plaintiffs-appellants: David Rechberger, Nicollette Munson, Rolf Munson, Laurel Hyde Boni, Dinah McKay, Donald Sherwood, William B. Swafford, Jr., Marilyn Kepes, Donald Wrege, and Douglas Johnson, v. **Defendants-appellees:** Boulder County Board of County Commissioners, and Boulder County Housing Authority.	▲ COURT USE ONLY ▲
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OPENING BRIEF	

CERTIFICATE OF COMPLIANCE

I hereby certify that this brief complies with all requirements of C.A.R. 28 and C.A.R. 32, including all formatting requirements set forth in these rules. Specifically, the undersigned certifies that:

This brief complies with C.A.R. 28(g) because it contains 8096 words.

This brief complies with C.A.R. 28(a)(7)(A). It contains under a separate heading before the discussion of each issue a concise statement of: (1) the applicable standard of appellate review with citation to authority; and (2) whether the issue was preserved and the precise location in the record where the issue was raised and where the court ruled.

I acknowledge that my brief may be stricken if it fails to comply with any of the requirements of C.A.R. 28 and C.A.R. 32.

/s/ David S. Chipman

TABLE OF CONTENTS

TABLE OF AUTHORITIES ..... iii-v

ISSUES PRESENTED FOR REVIEW 1

STATEMENT OF THE CASE 3

SUMMARY OF THE ARGUMENT 7

ARGUMENT 9

I. The complaint states a plausible claim for breach of contract against the County. The trial court's dismissal under Rules 12(b)(5) and 12(b)(1), therefore, was erroneous. 9

A. This case involves a specific, enforceable promise, not political rhetoric. 13

B. The contractual language is specific, plain, and unambiguous. 15

C. The complaint clearly alleges a "meeting of the minds" on the contract's material terms. 18

D. The County admitted the contract's existence after the ballot intiative vote. 21

E. Plaintiffs' complaint satisfies Colorado's liberal standing requirements. 22

II. The complaint states a plausible claim for promissory estoppel against the County. The trial court's dismissal under Rule 12(b)(5), therefore, was erroneous. 23

A. The County should have reasonably expected Plaintiffs to rely on its promise. 26

B. Plaintiffs detrimentally relied on the County's promise. 27

III. The complaint also contains plausible claims for declaratory judgment and mandamus. 28

IV. The trial court erred in dismissing Plaintiffs' fraudulent conveyance claim.....31

A. Plaintiffs, as creditors, have standing under CUFTA. 32

B. Plaintiffs' fraudulent conveyance claim does not sound in tort.....32

V. This Court should clarify and correct the holding of *Thompson Creek* regarding Plaintiffs' remedy of specific performance.....35

CONCLUSION 39

TABLE OF AUTHORITIES

Cases

Adams v. City of Westminster,
140 P.3d 8, 10 (Colo. App. 2005) 33

Agritrack, Inc. v. DeJohn Housemoving, Inc.,
25 P.3d 1187, 1192 (Colo. 2001) 17, 18

Ainscough v. Owens,
90 P.3d 851, 855 (Colo. 2004) 10, 11

Ashcroft v. Iqbal,
556 U.S. 662, 678 (2009) 11, 12

Barber v. Ritter,
196 P.3d 238 (Colo. 2008) ..... passim

Bd. of Regents of the State Univs. of Wisc. v. Davis,
74 Cal. App. 3d 862, 872-73 (Cal Ct. App. 1977) 17

Berg v. Obama,
574 F. Supp. 2d at 528 ..... 14, 15

Board of County Comm'rs v. DeLozier,
917 P.2d 714, 716 (Colo. 1996) 25

Bush v. State Farm Mut. Auto. Ins. Co.,
101 P.3d 1145, 1146 (Colo. App. 2004) 16

Camas Colo., Inc. v. Bd. of Cty. Comm'rs,
36 P.3d 135, 138 (Colo. App. 2001) 33

Cherokee Metro. Dist. v. Simpson,
148 P.3d 142, 151 (Colo. 2006) 26

Ciccarelli v. Guaranty Bank,
99 P.3d 85, 89 (Colo. App. 2004) 35

City of Colo. Springs v. Conners,
993 P.2d 1167, 1175 (Colo. 2000) 35

County of San Diego v. Perrigo,
318 P.2d 542, 545 (Cal. Ct. App. 1957) 16

Farmers Ins. Exch. v. Dist. Court,
862 P.2d 944, 947 (Colo. 1993) 29

Gramiger v. Crowley,
660 P.2d 1279, 1281 (Colo. 1983) 29

Hickenlooper v. Freedom from Religion Found., Inc., 2014 CO 77, ¶¶ 10-11 23

Indiana ex rel. Anderson v. Brand,
303 U.S. 95, 100 (1938) 15

Indus. Prods., Int'l, Inc. v. Emo Trans., Inc.,
962 P.2d 983, 988 (Colo. App. 1997) 22

JM Vidal v. Texdis USA, Inc.,
746 F. Supp. 2d 599, 618-19 (S.D.N.Y. 2011) 17

Morris v. Askeland Enters., Inc.,
17 P.3d 830, 832 (Colo. App. 2000) 35

People v. Manning,
672 P.2d 499, 512 (Colo. 1983) 38

Robbins v. Okla. ex rel. Dep't of Human Servs.,
519 F.3d 1242, 1247 (10th Cir. 2008) 11

Schempp v. Lucre Mgmt. Group, LLC,
75 P.3d 1157, 1161 (Colo. App. 2003) 34

Sunshine v. M.R. Mansfield Realty, Inc.,
575 P.2d 847, 849 (Colo. 1978) 18, 19, 20

Thompson Creek Townhomes, LLC v. Tabernash Meadows Water & Sanitation Dist.,
240 P.3d 554, 556 (Colo. App. 2010) 9, 36, 37

Tuttle v. ANR Freight System, Inc.,
797 P.2d 825, 829 (Colo. App. 1990) 18

Truby v. Denham,
No. 16-cv-02764, 2017 U.S. Dist. LEXIS 196933, at *8 (D. Colo. Nov. 30, 2017) 12

Vigoda v. Denver Urban Renewal Auth.,
646 P.2d 900, 905 (Colo. 1982) 25

Walsenburg Sand & Gravel Co. v. City Council of Walsenburg,
160 P.3d 297, 299 (Colo. App. 2007) ..... passim

Warne v. Hall,
373 P.3d 588, 591-95 (Colo. 2016) 11

Wheat Ridge Urban Renewal Auth. v. Cornerstrone Group XXII, LLC,
176 P.3d 737 (Colo. 2007) 9, 36, 37, 38

Wibby v. Boulder County Bd. of Comm'rs,
2016 COA 104, ¶ 18 15

Statutes

§ 24-10-101 to -113, C.R.S. (2017) 33

§ 24-10-106 33

§ 38-8-102(3) 32

§ 38-8-102(5) 32

§§ 38-8-101 to -112, C.R.S. 32

§ 38-8-105(2), C.R.S. (2017) 34

ISSUES PRESENTED FOR REVIEW

The trial court dismissed Plaintiffs' claims for breach of contract, promissory estoppel, fraudulent conveyance, declaratory judgment, and mandamus holding that Plaintiffs lacked standing under Colorado Rule of Civil Procedure 12(b)(1) and failed to allege claims under Colorado Rule of Civil Procedure 12(b)(5). This appeal presents five issues:

1. As alleged, Boulder County promised Gunbarrel residents that, if they passed a tax increase, the County would "provide a matching contribution towards open space purchase . . . up to a maximum of $1,900,000." The residents accepted the County's offer by passing the tax. The tax netted over $2 million, but the County matched only $1.3 million, short of the $1.9 million obligation. Have the residents (Plaintiffs here) alleged a claim for breach of contract?

2. As alleged, the County made its specific promise for the specific purpose of inducing Plaintiffs to rely thereon and approve the tax increase. And, as alleged, Plaintiffs relied on that promise (as the County intended). Have Plaintiffs alleged a plausible claim for promissory estoppel?

3. Plaintiffs' declaratory judgment and mandamus claims depend on the existence of their contract-based rights (breach of contract or promissory estoppel). As alleged, Plaintiffs have a clear contract right to demand that the County perform what it clearly promised. Have Plaintiffs alleged plausible claims for declaratory judgment and mandamus?

4. Under Colorado's fraudulent transfer act, a party cannot transfer for inadequate consideration something contractually obligated to another. As alleged here, the County bought the last property available for open space and—contrary to its obligation to Plaintiffs—transferred it to the County's Housing Authority for inadequate consideration. But for this transfer, the property would have been dedicated to open space. Have Plaintiffs alleged a claim for fraudulent transfer? And does this claim sound in tort for purposes of the governmental immunity act?

5. In 2007, the Colorado Supreme Court held that a court can order specific performance from the government when it does not compel the exercise of a core governmental power. Here, the trial court relied upon a subsequent court of appeals opinion prohibiting specific performance against the government under all circumstances. The court of appeals

opinion strays from the established supreme court precedent. Should this court follow the supreme court's precedent and recognize Plaintiffs' specific performance remedy?

STATEMENT OF THE CASE

In 1993, Boulder County proposed a ballot initiative designed to reduce residential development in the Gunbarrel Public Improvement District ("**GPID**") through the purchase of land for open space.[1] The ballot initiative asked Gunbarrel residents (the GPID property owners) to vote on a tax increase to underwrite a $2.5 million bond to purchase and maintain open space.[2] As part of the ballot initiative, and to induce its passage, the County promised GPID voters that if they would agree to the tax increase, the County would match contributions towards open space purchases up to $1.9 million.[3]

Prior to the vote, the County reiterated this promise in written and oral statements to the GPID property owners:

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[1] CF, p 3, ¶ 19.
[2] CF, p 3, ¶ 20; p 6 ¶¶ 36-37.
[3] CF, pp 6-7, ¶ 38.

- On or around September 21, 1993, the County held a public hearing regarding the upcoming election. During the hearing, a County commissioner stated that: "On the open space issue, I think it is very appropriate that we put in half should our [greater Boulder County] open space tax pass . . . for the purchase of the remainder of the [GPID] open space.[4]

- A publication by the authors of the open space initiative, including the County, stated: "[I]f the County Sales Tax passes in November, the County will pay half of the costs to acquire the Gunbarrel Open Space!"[5]

- This campaign flyer also instructed voters that:

> The Boulder County Sales Tax for Open Space (0.25% -- 25c on $100 purchased) will raise funds that the County will use to purchase and maintain open space. For Gunbarrel, those funds would provide the 50% match that the County Commissioners have promised to support Gunbarrel's Open Space ballot item. If this item passes, Gunbarrel residents will directly see the benefits in open space purchased within Gunbarrel – to the tune of about $1.9 million dollars.[6]

These representations and promises culminated in the County's promise, contained in the County's official ballot initiative election notice: "[S]ubject to the passage of this issue and the County Open Space tax, the County will provide a matching contribution towards open space purchase within [the

[4] CF, p 7, ¶ 40.
[5] *Id.* ¶ 42.
[6] *Id.* ¶ 43.

GPID] up to a maximum amount of $1,900,000."[7] Plaintiffs relied on the County's promise and passed the ballot initiative.[8]

For a while, the County complied with the parties' agreement. And from 1994 through 2009, the County contributed $1,305,634 of the promised matching funds towards open space purchases.[9] But the County promised Gunbarrel residents $1,900,000 and owes those residents the remaining $594,366.[10]

In 2013, the County had the opportunity to purchase what appears to be the last remaining open space parcel in the GPID.[11] Instead of using the promised "match" funds and complying with its agreement, the Boulder County Board of County Commissioners purchased this property but refused to dedicate it as open space.[12] Instead, the Board transferred the property to the Boulder County Housing Authority in 2015 for inadequate

[7] CF, pp 6-7, ¶ 38.
[8] CF, p 7, ¶ 45.
[9] CF, p 8, ¶¶ 49-56.
[10] CF, p 9, ¶ 59.
[11] CF, pp 9-10, ¶¶ 60-73.
[12] CF, p 9, ¶ 63.

consideration.[13] Conveniently, the individuals who control the Board and the Housing Authority are one and the same.[14]

In October 2016, Plaintiff Nikki Munson confronted the County about this breach.[15] At first, the County acknowledged the match agreement and admitted it was bound by the GPID electors' vote on the ballot initiative.[16] But the County later disavowed the agreement and its obligation entirely.[17]

Plaintiffs, GPID property owners and would-be beneficiaries of the County's match agreement, alleged claims of breach of contract, fraudulent conveyance (to unwind the transfer to the Housing Authority), promissory estoppel, declaratory judgment, and, alternatively, mandamus. The County and the Housing Authority filed a motion to dismiss, seeking dismissal of Plaintiffs' claims under Rule 12(b)(1) for lack of standing or Rule 12(b)(5) for failure to state a claim. The trial court granted the motion as to all claims. This appeal followed.

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[13] *Id.* ¶¶ 66-67.
[14] *Id.* ¶ 68.
[15] CF, p. 10, ¶ 75.
[16] *Id.* ¶¶ 75-77.
[17] CF, p 11, ¶ 80.

SUMMARY OF THE ARGUMENT

At their core, Plaintiffs' claims hinge on their contractual right (either through breach of contract or promissory estoppel) to enforce the County's promise to match taxes for GPID open space up to a maximum of $1.9 million. The trial court's errors with respect to this contractual right, and Plaintiffs' responses thereto, can be summarized as follows:

1. The County made a specific promise to a specific audience to induce specific action on a specific subject matter. This separates this case from the generalized political rhetoric addressed in *Berg v. Obama* and similar cases on which the trial court relied.
2. The plain language of the County's promise—"the County will provide a matching contribution towards open space purchase within the [GPID] up to a maximum of $1,900,000"—has only one reasonable interpretation. The County made the promise (an offer) to induce the GPID electors to approve the tax increase (an acceptance). Any assertion that the County has discretion to match whatever amount it desires, from $0 to $1.9 million, defies the plain meaning of the words used and, frankly, rationality.

3. The County's multiple statements about what it means to match up to $1.9 million eliminates any reasonable contention that the parties lacked a meeting of the minds. The complaint alleges the County's representations, and other supporting facts, in detail. The trial court failed to accept these facts as true. Instead, the trial court either ignored them or viewed them in a light favorable to the County, all contrary to Colorado law governing Rule 12(b)(5).

Additionally, the trial court erroneously concluded that Plaintiffs are not "creditors" under the Colorado Uniform Fraudulent Transfers Act ("**CUFTA**") and that Plaintiffs' CUFTA claim is subject to Colorado's Governmental Immunity Act ("**CGIA**"). Plaintiffs are CUFTA "creditors" because they possess a "claim," the collection of which was frustrated by the County's transfer of the last available open space property to the County Housing Authority for inadequate consideration. And Plaintiffs' CUFTA claim does not lie in tort because it is an equitable claim designed to make Plaintiffs whole.

Finally, this case presents an opportunity to clarify an incorrect court of appeals opinion relating to Plaintiffs' specific performance remedy. The

2010 court of appeals opinion in *Thompson Creek Townhomes, LLC*[18] erroneously barred all specific performance remedies against governmental entities. This strayed from the Colorado Supreme Court's 2007 opinion in *Wheat Ridge Urban Renewal Authority*[19] which only barred specific performance as to core governmental functions. Although the trial court was bound by *Thompson Creek*, this Court is not and should clarify the issue consistent with *Wheat Ridge*.

For all of these reasons, Plaintiffs respectfully request that the trial court's order of dismissal be reversed and that the case be remanded for further action.

ARGUMENT

I. The complaint states a plausible claim for breach of contract against the County. The trial court's dismissal under Rules 12(b)(5) and 12(b)(1), therefore, was erroneous.

Standard of review and preservation. The Court has de novo review over a question of standing under Colorado Rule of Civil Procedure 12(b)(1).[20] Similarly, the Court has de novo review over the trial court's

[18] 240 P.3d 554 (Colo. App. 2010).
[19] 176 P.3d 737 (Colo. 2007).
[20] *Barber v. Ritter*, 196 P.3d 238, 245-46 (Colo. 2008).

rulings under Colorado Rule of Civil Rule 12(b)(5), while accepting as true all allegations of fact in the complaint and viewing the allegations in the light most favorable to the Plaintiffs.[21]

Plaintiffs preserved this issue at CF 52-55, 60-62, and the trial court ruled on it at CF 96-99.

Applicable law. A question of standing under Rule 12(b)(1) is a preliminary inquiry designed to ensure that the plaintiff is the proper party to bring suit. "In Colorado, parties to lawsuits benefit from a relatively broad definition of standing."[22] A party has standing if it demonstrates that (1) it suffered an injury in fact, and (2) the injury was to a legally protected interest.[23]

An injury-in-fact may be "tangible, such as physical damage or economic harm, or intangible, such as aesthetic harm or the deprivation of civil liberties."[24] Only those injuries that are "indirect and incidental to the

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[21] *Walsenburg Sand & Gravel Co. v. City Council of Walsenburg*, 160 P.3d 297, 299 (Colo. App. 2007).
[22] *Ainscough v. Owens*, 90 P.3d 851, 855 (Colo. 2004).
[23] *Barber*, 196 P.3d at 245-46.
[24] *Id.*

defendant's conduct" fail to constitute an injury-in-fact for purposes of standing.[25] To determine whether there was an injury in fact, the court accepts as true the allegations in the complaint.[26]

The second prong of the standing analysis requires a plaintiff to identify a legally-recognized theory or claim for relief under which the party seeks remedy for his injury. "Whether the plaintiff's alleged injury was to a legally protected interest 'is a question of whether the plaintiff has a claim for relief under the constitution, the common law, a statute, or a rule or regulation.'"[27]

A Rule 12(b)(5) motion succeeds *only* where the complaint's allegations fail to state facts that support plausible grounds for relief.[28] "Plausible" is not synonymous with probable.[29] A complaint satisfies the

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[25] *Id.* at 246.
[26] *Ainscough*, 90 P.3d at 857.
[27] *Barber*, 196 P.3d at 246 (quoting *Ainscough*, 90 P.3d at 856).
[28] *Warne v. Hall*, 373 P.3d 588, 591-95 (Colo. 2016) (adopting the plausibility standard from Federal case law).
[29] *See Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009); *Robbins v. Okla. ex rel. Dep't of Human Servs.*, 519 F.3d 1242, 1247 (10th Cir. 2008) (citing *Bell Atl. Corp. v. Twombly*, 550 U.S. 544 (2007)) ("A well-pleaded complaint may proceed even if it strikes a savvy judge that actual proof of those facts is

plausibility standard where it alleges enough facts to show "more than a sheer possibility" that the plaintiff is entitled to relief.[30] The facts alleged are sufficient where they elevate the plaintiff's claims above the level of "mere speculation."[31]

Discussion. The trial court conflated the standing requirements under Rule 12(b)(1) with the plausibility standard under Rule 12(b)(5). Plausibility under Rule 12(b)(5) is not required to demonstrate standing. By the same token, and looking at the issue in reverse, it cannot be disputed that a plausible claim under Rule 12(b)(5) necessarily satisfies the "injury in fact" and "legally protected interest" requirements of standing. For this reason, Plaintiffs will first demonstrate that the complaint pleads a breach of contract claim under Rule 12(b)(5). This showing additionally—and more than adequately—satisfies Colorado's lenient standing requirements.

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improbable, and that a recovery is very remote and unlikely.") (internal punctuation omitted).

[30] *Iqbal*, 556 U.S. at 678.

[31] *Truby v. Denham*, No. 16-cv-02764, 2017 U.S. Dist. LEXIS 196933, at *8 (D. Colo. Nov. 30, 2017).

The trial court's dismissal of the breach of contract claim under Rule 12(b)(5) resulted from five errors. First, the trial court erroneously described the County's express promise as mere political rhetoric, unfit for contractual consideration. Second, the trial court failed to give the County's words their plain meaning. The plain meaning of the language leads to only one reasonable interpretation. Third, the trial court failed to accept the complaint's allegations as true and failed to view them in the light most favorable to Plaintiffs. As a result, for example, the trial court skipped key allegations confirming a meeting of the minds on all material contract terms. Fourth, the trial court ignored the County's post-contract admission of an agreement to match up to $1.9 million. Fifth, because the complaint properly alleges a claim for breach of contract, Plaintiffs necessarily established standing, something the trial court missed. Each error will be addressed in turn.

A. This case involves a specific, enforceable promise, not political rhetoric.

The trial court incorrectly described the County's promise to the GPID electors as vague "statements of principle and intent in the political

realm" that "are not enforceable promises under contract law."[32] In doing so, the trial court incorrectly lumped Plaintiffs' claims together with those made by the plaintiff in *Berg v. Obama*, a case from the U.S. District Court for the Eastern District of Pennsylvania.[33]

In *Berg*, a long-time political donor sued the Democratic National Committee and then-candidate Barack Obama for, among other things, promissory estoppel. Berg alleged that the DNC and Mr. Obama had promised to (i) "use technology to make government more transparent, accountable and inclusive,"(ii) "maintain and restore our Constitution to its proper place in our government," and (iii) "uphold the United States Constitution and to be open and honest with all questions presented."[34] Berg claimed that those promises, upon which he claimed to have reasonably relied, were broken to his detriment because, he asserted, Mr. Obama was an "illegal candidate", and the DNC failed to vet his

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[32] CF, p 96 (citing *Berg v. Obama*, 574 F. Supp. 2d 509, 529 (E.D. Pa. 2008) (internal quotation marks omitted).
[33] *Id.*
[34] *Berg*, 574 F. Supp. 2d at 528 (quoting DNC publications and candidate Obama).

candidacy.[35] Not surprisingly, the trial court dismissed the promissory estoppel claim under Federal Rule of Civil Procedure 12(b)(6) because such generalized "political rhetoric" cannot create enforceable rights under contract law.[36]

The political rhetoric in *Berg* bears no resemblance to the contractual promise made here. As detailed in the complaint, the County made a specific promise (to match the tax increase up to $1.9 million) to a specific group (GPID property owners) for a specific purpose (to acquire open space within the GPID) for specific consideration (if GPID electors approved the tax increase). The County's promises and the rhetoric in *Berg* could not be more dissimilar.

B. The contractual language is specific, plain, and unambiguous.

In Colorado, a legislative body can bind itself contractually if the words used make the contractual promise clear.[37] Here, the County's

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[35] *Id.*

[36] *Id.* at 529.

[37] *Wibby v. Boulder County Bd. of Comm'rs*, 2016 COA 104, ¶ 18 (citing *Colo. Springs Fire Fighters Ass'n v. Colo. Springs*, 784 P.2d 766, 773 (Colo. 1989), and *U.S. Trust Co. of N.Y. v. New Jersey*, 431 U.S. 1, 18, 97 (1977)); *see also*, *Indiana ex rel. Anderson v. Brand*, 303 U.S. 95, 100 (1938) ("[A] legislative

promise is specific, plain and unambiguous. It is found in the County's official election notice. It says that *if* GPID electors approve the tax increase, *then* the County will match those tax proceeds up to $1.9 million to purchase open space:

> The Boulder County Commissioners have indicated that, subject to the passage of this issue and the County Open Space tax, the County will provide a matching contribution towards open space purchase within the [GPID] up to a maximum of $1.9 million.[38]

When interpreting a contract—or, as here, ascertaining whether a contract exists—a court should "give the words their plain meaning, avoid strained and technical interpretations, and construe the contract as would a reasonable person of ordinary intelligence."[39] The trial court disregarded these principles.

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enactment may contain provisions which, when accepted as the basis of action by individuals, become contracts between them and the State or its subdivisions."); *County of San Diego v. Perrigo*, 318 P.2d 542, 545 (Cal. Ct. App. 1957) (holding that "without question the election created a contractual relation between the electors and the [Board of] [S]upervisors").

[38] CF, pp 6-7, ¶ 38.

[39] *Bush v. State Farm Mut. Auto. Ins. Co.*, 101 P.3d 1145, 1146 (Colo. App. 2004).

The plain meaning of the County's promise is that if the GPID electors approved the tax increase, the County would be obligated to match any tax proceeds up to $1.9 million. "Matching", as defined by the Merriam-Webster Dictionary, means "equal in amount – made matching contributions; especially: equal in amount to money obtained from another source."[40] And, plainly, when someone agrees to "match" a contribution "up to" a certain amount, that person pledges to contribute the matching funds until that set amount is reached. No other reading is reasonable.[41]

A contract may be express or implied in fact. "[A] contract implied in fact is based on the conduct of the parties to the agreement and it is the conduct itself which establishes the agreement."[42] An implied-in-fact contract "arises from the parties' conduct which evidences a mutual

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[40] Merriam-Webster Dictionary, http://www.m-w.com.
[41] *See Bd. of Regents of the State Univs. of Wisc. v. Davis*, 74 Cal. App. 3d 862, 872-73 (Cal Ct. App. 1977) (enforcing promisor's agreement to "match funds raised from other sources up to a total of $150,000" by requiring promisor to match funds dollar-for-dollar); *see also JM Vidal v. Texdis USA, Inc.*, 746 F. Supp. 2d 599, 618-19 (S.D.N.Y. 2011) (holding that entity's promise to "match JMV's initial contribution to the 'Advertising Fund' up to a maximum amount equal to JMV's required regular contribution of $10,000" obligated the entity to contribute $10,000).
[42] *Agritrack, Inc. v. DeJohn Housemoving, Inc.*, 25 P.3d 1187, 1192 (Colo. 2001).

intention to enter into a contract."[43] For example, a contract offer can be accepted through action instead of a signature.[44] As alleged in the complaint, in response to the County's unambiguous offer to match the tax proceeds up to $1.9 million, the GPID electors accepted that offer, and thus consummated the contract, by voting for and paying the increased taxes.

C. The complaint alleges a "meeting of the minds" on the contract's material terms.

To have an enforceable contract, the parties must achieve mutual assent, a "meeting of the minds"—that is, they must agree on the meaning of the contract's material terms.[45] The trial court found, here, that there was no meeting of the minds about what it means to match "up to a maximum amount of $1,900,000."[46] The trial court listened to the County's current argument that the "up to" language created no obligation at all but merely gave the County discretion to match whatever amount it wanted, from $0

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[43] *Id.*

[44] *See Tuttle v. ANR Freight System, Inc.*, 797 P.2d 825, 829 (Colo. App. 1990) (holding that an employment proposal was accepted by a party "taking and keeping her job").

[45] *Sunshine v. M.R. Mansfield Realty, Inc.*, 575 P.2d 847, 849 (Colo. 1978).

[46] CF, pp 97-98.

to $1.9 million.[47] Contrary to Rule 12(b)(5), the trial court neither accepted the complaint's allegations as true nor viewed them in the light most favorable to Plaintiffs. The trial court appears to have ignored some of Plaintiffs' most damning allegations that clarify the County's contemporaneous understanding of the promise's meaning. Instead, the trial court placed credence on the County's "current" position.

In addition to the plain meaning of language agreeing to a "matching contribution . . . up to a maximum of $1,900,000 million,"[48] the complaint alleges that the County knew exactly what that language meant. For example, as alleged in the complaint, the County contemporaneously admitted that its agreement to "match" created an obligation to share in the open space cost 50/50:

- During a public hearing about the election, a Boulder County Commissioner stated that: "On the open space issue, I think it is very appropriate that we put in *half* should our [greater Boulder County] open space tax pass . . . for the purchase of the remainder of the [GPID] open space."[49]

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[47] *Id.*
[48] *Supra* 17 n.40.
[49] CF, p 7, ¶ 40 (emphasis added).

- Prior to the election, Boulder County published campaign information stating: "[I]f the County Sales Tax passes in November, the County will pay *half* of the costs to acquire the Gunbarrel Open Space![50]

- This same campaign flyer also stated: "The Boulder County Sales Tax for Open Space . . . will raise funds that the County will use to purchase and maintain open space. For Gunbarrel, those funds would provide the 50% match that the County Commissioners have promised to support Gunbarrel's Open Space ballot item. If this item passes, Gunbarrel residents will directly see the benefits in open space purchase within Gunbarrel—to the tune of about $1.9 million dollars."[51]

Each of these statements reaffirms that the County intended to obligate itself to match contributions up to $1.9 million.

A party cannot use a "meeting of the minds" defense where, as here, the language of the promise is amenable to only one reasonable interpretation.[52] The plain meaning of the promise's words, coupled with the County's own contemporaneous understanding, show that the County knew what it was obligating itself to do. Any contrary position the County

[50] *Id.* ¶ 42 (emphasis added).
[51] *Id.* ¶ 43.
[52] *Sunshine*, 575 P.2d at 849.

now espouses is unreasonable. It was clear error for the trial court to hold otherwise.[53]

D. The County admitted the contract's existence after the ballot initiative vote.

As alleged in the complaint, after the fact, the County admitted that it had "agreed" to provide matching funds. On October 24, 2016, Plaintiff Nikki Munson sent a letter to the County expressing her concerns about the open space issue and asking the County to do as it promised.[54] In a response letter dated November 4, 2016, the County conceded that "the county agreed to match up to [$1.9 million]."[55] Though the County argued about the extent of that agreement—using the same weak argument proffered here about whether the obligation extended to the entire $1.9

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[53] The trial court's misapprehension of the meeting of the minds issue led the court to conclude, also, that Plaintiffs could not allege breach and damages. (CF, pp 98-99.) Because the complaint properly alleges a meeting of the minds, its allegations about the breach of the agreed-upon promise, and resulting damages, also are properly pled. (S*ee* CF, pp 11-12.)

[54] CF, p 10, ¶ 75.

[55] *Id.* ¶ 76 (emphasis omitted).

million[56]—the County nevertheless admitted to the existence of an agreement. The trial court ignored this admission.

In Colorado, "[a]n enforceable contract requires mutual assent to an exchange, between competent parties, with regard to a certain subject matter, for legal consideration."[57] The complaint establishes each of these elements. As demonstrated above, the complaint alleges a meeting of the minds (mutual asset) about the meaning of the County's promise to match "up to a maximum amount of $1,900,000" (the certain subject matter) if the GPID electors approved the tax (the legal consideration). And no one disputes the County and plaintiffs are competent parties. The trial court's refusal to acknowledge the existence of an enforceable contract was erroneous and should be reversed.

E. Plaintiffs' complaint satisfies Colorado's liberal standing requirements.

Because plaintiffs have properly alleged a plausible claim for breach of contract, they easily clear the lower bar of showing "injury in fact" to a

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[56] *Id.*

[57] *Indus. Prods., Int'l, Inc. v. Emo Trans., Inc.*, 962 P.2d 983, 988 (Colo. App. 1997) (cited at CF, p 96).

"legally protected interest" and, thus, have established standing under Rule 12(b)(1). If the County breached a contractual obligation to Plaintiffs, that conduct, by definition, has created an "injury in fact."[58] And by merely identifying in their complaint a breach of contract claim, Plaintiffs satisfied the "legally protected interest" requirement.[59] Therefore, dismissal under Rule 12(b)(1) was in error and should be reversed.

II. The complaint states a plausible claim for promissory estoppel against the County. The trial court's dismissal under Rule 12(b)(5), therefore, was erroneous.

Standard of review and preservation. The Court has de novo review over the trial court's rulings under Rule 12(b)(5), while accepting as true all allegations of fact in the complaint and viewing the allegations in the light most favorable to the plaintiffs.[60]

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[58] *See Barber*, 196 P.3d at 246 (finding that only those injuries that are "indirect and incidental to the defendant's conduct" fail to establish injury-in-fact for standing purposes).

[59] *See, e.g., Hickenlooper v. Freedom from Religion Found., Inc.*, 2014 CO 77, ¶¶ 10-11 (finding that merely identifying a claim for relief under common law or statute "clearly satisfies the [legally protected interest requirement]").

[60] *Walsenburg*, 160 P.3d at 299.

Plaintiffs' preserved this issue at CF 62-63, and the trial court ruled on it at CF 106-07.

Applicable law. The applicable law pertaining to a review under 12(b)(5) is the same as set forth in Part I above.

Discussion. The same errors that induced the trial court's dismissal of the contract claim also infected its treatment of the promissory estoppel claim. As with the contract claim, the trial court lumped the County's specific promise together with the promises in the *Berg v. Obama* case and dismissed them as political rhetoric. As with the contract claim, the trial court failed to acknowledge the plain language of the County's written promise and what that plain language would unambiguously convey to ordinary people like the GPID electors. And, as with the contract claim, the trial court failed to accept the complaint's allegations as true and, indeed, weighed allegations in the County's favor, not the other way around as Rule 12(b)(5) requires.

In fact, the complaint's allegations even more strongly support the promissory estoppel claim as an alternative to the contract claim. Even where the parties lack mutual assent on all essential terms of a contract,

Colorado law enforces a promise where the promisor (the County) should reasonably have expected its promise (the promise to match up to $1.9 million) to induce the subsequent action (the electors' approval of the ballot initiative).[61] A promise enforced pursuant to promissory estoppel is treated like a contract "and full-scale enforcement by normal remedies is appropriate."[62]

A claim for promissory estoppel has four elements: (1) the promisor made a promise to the promisee; (2) the promisor should have reasonably expected that the promise would induce action or forbearance by the promisee; (3) the promisee reasonably relied on the promise to his detriment; and (4) the promise must be enforced to prevent injustice.[63] The trial court conceded that the County made a promise. Thus, the trial court directed its analysis to the second and third elements. The trial court was mistaken with respect to both.

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[61] *See Board of County Comm'rs v. DeLozier*, 917 P.2d 714, 716 (Colo. 1996) (citing *Vigoda v. Denver Urban Renewal Auth.*, 646 P.2d 900, 905 (Colo. 1982)).
[62] *Id.*
[63] *Cherokee Metro. Dist. v. Simpson*, 148 P.3d 142, 151 (Colo. 2006).

A. The County should have reasonably expected Plaintiffs to rely on its promise.

As with the contract claim, the trial court incorrectly concluded that the County's promise to match funds was akin to "promises . . . that are statements of principle and intent in the political realm" unenforceable under contract law.[64] This was erroneous for the same reasons explained above in Part 1(A). Unlike the alleged "promises" from the *Berg* case, the County made a specific promise to a specific group about a specific issue seeking to induce specific action. The County's promises in this case fall well-outside mere political rhetoric.

And, as with the contract claim, the trial court failed to give the County's words their plain meaning. Given the County's multiple statements of the same promise—all expressly restated in the complaint[65] —the County left no doubt about its intentions. It promised to match the GPID electors' contributions up to $1.9 million with the specific purpose of inducing the GPID electors to pass the ballot initiative. No other

[64] CF, p 106 (quoting *Berg*, 574 F. Supp. 2d at 529)
[65] CF, pp 7, 13-14, 30.

interpretation is reasonable, especially if that interpretation stems, as it appears to here, from weighing the complaint's allegations in the County's favor.

B. Plaintiffs detrimentally relied on the County's promise.

The trial court found that Plaintiffs could not plausibly allege that they detrimentally relied on the County's promise because, according to the trial court, the County's contribution of $1.3 million toward open space "benefited the GPID."[66] To the extent this conclusion derives from the argument that the County's promise to match was merely an option to contribute whatever the County desired, from $0 to $1.9 million, it is erroneous for the same reasons set forth above in Part I(C). To the extent this conclusion derives from the argument that Plaintiffs had no right to rely on the complete performance of the promissory obligation, the trial court's conclusion makes no sense. By the promise's plain terms, the County was required to contribute $1.9 million in matching funds. Plaintiffs' receipt of *some* of the benefit does not defeat a finding of

[66] CF, pp 106-07.

detrimental reliance. Plaintiffs are entitled to justifiably rely on the County's *full* performance of its promise, and the complaint alleges just that.

The trial court's dismissal of the promissory estoppel claim was based on clear error, especially in the Rule 12(b)(5) context, and should be reversed.

III. The complaint also contains plausible claims for declaratory judgment and mandamus.

Standard of review and preservation. The Court has de novo review over a question of standing under Rule 12(b)(1).[67] Similarly, the Court has de novo review over the trial court's rulings under Rule 12(b)(5), while accepting as true all allegations of fact in the complaint and viewing the allegations in the light most favorable to the Plaintiffs.[68]

Plaintiffs preserved this issue at CF 63, and the trial court ruled on it at CF 107-08.

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[67] *Barber*, 196 P.3d at 245-46.
[68] *Walsenburg*, 160 P.3d at 299.

Applicable law. The applicable law pertaining to a review under 12(b)(1) and 12(b)(5) is the same as set forth in Part I above. Declaratory judgment is available where, as here, a party seeks a declaration of rights, status, or legal relations under a relationship governed by contract law to resolve an existing question or legal controversy.[69] To establish standing to bring a declaratory judgment claim, "a plaintiff must assert a legal basis on which a claim for relief can be grounded."[70]

To succeed on a mandamus claim, a plaintiff must show the following: (1) a clear right to the relief sought; (2) a clear duty to perform the act requested; and (3) no other available remedy.[71]

Discussion. The trial court, without substantive explanation, summarily dismissed both the declaratory judgment claim and the mandamus claim. After reciting the elements for each claim, the court simply indicated that such claims are dismissed "based on the legal standards and analyses articulated in the Sections above."[72] Without more

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[69] *Farmers Ins. Exch. v. Dist. Court*, 862 P.2d 944, 947 (Colo. 1993).
[70] *Id.*
[71] *Gramiger v. Crowley*, 660 P.2d 1279, 1281 (Colo. 1983).
[72] CF, pp 107-08.

explanation from the trial court, Plaintiffs' cannot identify the trial court's errors other than attributing them to the same errors addressed above in Parts I and II.

For example, if the complaint alleges the existence of a contract (or, alternatively, the grounds for promissory estoppel), then, by extension, Plaintiffs' declaratory judgment claim also passes scrutiny under Rule 12(b)(5) and, by extension, Rule 12(b)(1). For that reason, Plaintiffs refer this Court to the discussion of the trial court's errors in Parts I and II.

With respect to mandamus, the trial court concludes that the complaint does not satisfy the mandamus requirements but does not say why. Plaintiffs are left to conclude that the errors addressed in Parts I and II form the basis for the trial court's finding of a failure to plead "a clear right to relief sought" or "a clear duty" to perform the act requested.[73] If the County has a clear duty to fulfill its contractual obligation to match up to $1.9 million, and if Plaintiffs have a clear right to expect the County to keep its contractual promise, then the dismissal of the mandamus claim

[73] CF, p 108.

must also be reversed. For this reason, Plaintiffs refer the Court to their arguments and authorities set forth in Parts I and II.

IV. The trial court erred in dismissing Plaintiffs' fraudulent conveyance claim.

Standard of review and preservation. The trial court dismissed Plaintiffs' fraudulent conveyance claim under both Rules 12(b)(1) and 12(b)(5). The Court has de novo review over a question of standing under Rule 12(b)(1).[74] Similarly, the Court has de novo review over the trial court's rulings under Rule 12(b)(5), while accepting as true all allegations of fact in the complaint and viewing the allegations in the light most favorable to the plaintiffs.[75]

Plaintiffs preserved this issue at CF 63, and the trial court ruled on it at CF 101-105.

Applicable law. The applicable law pertaining to a review under 12(b)(1) and 12(b)(5) is the same as set forth in Part I above.

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[74] *Barber*, 196 P.3d at 245-46.
[75] *Walsenburg*, 160 P.3d at 299.

A. Plaintiffs, as creditors, have standing under CUFTA.

The trial court dismissed Plaintiffs' fraudulent transfer claim for lack of standing, holding that Plaintiffs were not "creditors" under the Colorado Uniform Fraudulent Transfers Act[76] ("**CUFTA**").[77] CUFTA defines "creditor" as "a person who has a claim."[78] A "claim," in turn, refers to "a right to payment, whether or not the right is reduced to judgment, liquidated, unliquidated, fixed, contingent, matured, unmatured, disputed, undisputed, legal, equitable, secured, or unsecured."[79] Here, Plaintiffs, as GPID property owners, have a right to a payment from the County. This payment, however, takes the form of the return of the real property the County transferred to the Housing Authority, because such transfer left no remaining real property for GPID to acquire for open space.

B. Plaintiffs' fraudulent conveyance claim does not sound in tort.

Because it held that Plaintiffs' fraudulent conveyance claim sounded in tort, the trial court dismissed the claim under the Colorado

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[76] §§ 38-8-101 to -112, C.R.S. (2017).
[77] CF, pp 100-102, 105.
[78] § 38-8-102(5).
[79] § 38-8-102(3).

Governmental Immunity Act ("**CGIA**").[80] The CGIA grants public entities immunity from "all claims for injury which lie in tort or could lie in tort regardless of whether that may be the type of action or the form of relief chosen by the claimant."[81] Public entities are not immune from actions grounded in contract.[82] To determine whether a claim lies in tort or not, the court should "review the nature of the alleged injury and the relief sought and examine whether the injury arises from the terms of a contract."[83] The grant of immunity should be strictly construed.[84]

The trial court's order contains no analysis of the nature of alleged injury or the relief sought by Plaintiffs. The court based its determination solely on the presence of two "badges of fraud." CUFTA identifies badges of fraud to be used by courts in determining whether a transfer was made with actual intent to defraud.[85] A single badge of fraud creates only a suspicion of fraud; while "several badges of fraud considered together *may*

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[80] § 24-10-101 to -113, C.R.S. (2017).
[81] § 24-10-106.
[82] *Adams v. City of Westminster*, 140 P.3d 8, 10 (Colo. App. 2005).
[83] *Id.*
[84] *Camas Colo., Inc. v. Bd. of Cty. Comm'rs*, 36 P.3d 135, 138 (Colo. App. 2001).
[85] *See* § 38-8-105(2), C.R.S. (2017).

infer intent to defraud." [86] The trial court noted only *two* badges of fraud.[87] And, to the court, the existence of those badges was outcome determinative. But an examination of the nature of Plaintiffs' claim and the relief sought makes clear that Plaintiffs' claim does not lie in tort.

With their fraudulent conveyance claim, Plaintiffs are simply asking the court to place them in the position they would have been but for the County's breach of the parties' agreement. But for the breach, the subject property would have been designated as open space, not transferred to the Housing Authority. The Colorado Supreme Court has recognized that claims do not lie in tort where the remedies for such claims are designed "to make the claimant whole within a particular setting, i.e., to place the claimant in the position she would have been in but for the discriminatory conduct."[88] Additionally, Colorado courts have found that equitable claims

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[86] *Schempp v. Lucre Mgmt. Group, LLC*, 75 P.3d 1157, 1161 (Colo. App. 2003) (emphasis).
[87] CF, p 102-03.
[88] *City of Colo. Springs v. Conners*, 993 P.2d 1167, 1175 (Colo. 2000) (superseded by statute on other grounds).

do not lie in tort for purposes of the CGIA.[89] And a claim for fraudulent transfer is an equitable claim.[90] Therefore, because Plaintiffs' CUFTA claim is equitable, and seeks to make Plaintiffs whole, it is not subject to the CGIA.

V. This Court should clarify and correct the holding of *Thompson Creek* regarding Plaintiffs' remedy of specific performance.

Standard of review and preservation. Plaintiffs raised this issue at CF 58-60, and the court ruled on it at CF 99-100. The Court reviews a trial court's ruling on a motion to dismiss de novo, accepting as true all allegations of fact in the complaint and viewing the allegations in the light most favorable to the plaintiff.[91]

Discussion. Plaintiffs' specific performance remedy should be protected. In *Thompson Creek Townhomes, LLC v. Tabernash Meadows Water & Sanitation District*, another division of the court of appeals barred all

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[89] *Ciccarelli v. Guaranty Bank*, 99 P.3d 85, 89 (Colo. App. 2004) (overruled on other grounds).
[90] *Id.* at 88 ("Fraudulent transfer claims are equitable in nature."); *Morris v. Askeland Enters., Inc.*, 17 P.3d 830, 832 (Colo. App. 2000) (noting that a fraudulent conveyance claim is "purely equitable").
[91] *Walsenburg*, 160 P.3d at 299.

specific performance remedies against the government.[92] This opinion contradicts prior Colorado Supreme Court precedent and should be corrected.[93]

The supreme court addressed the question of sovereign immunity from specific performance for the first—and only— time in *Wheat Ridge Urban Renewal Authority v. Cornerstone Group XXII, LLC*.[94] There, the supreme court held only that a court cannot order specific performance "to compel the exercise of core governmental powers that rest within the discretion of a coordinate branch of government."[95] The supreme court declined to decide whether the General Assembly had the power to "determine the availability of equitable relief for governmental breach of other kids of contractual obligations," leaving that question for another

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[92] 240 P.3d 554, 556 (Colo. App. 2010)
[93] The Colorado Supreme Court did not have an opportunity to address the *Thompson Creek* holding as no petition for writ of certiorari was filed in that case.
[94] 176 P.3d 737 (Colo. 2007).
[95] *Id.* at 745.

day.[96] But with its very language the supreme court drew a distinction between core and non-core governmental powers.

Thompson Creek completely erased this distinction and held that a governmental entity has immunity from specific performance for both core *and* non-core governmental functions.[97] *Thompson Creek* also reasoned, incorrectly, that *Wheat Ridge* suggested the General Assembly could determine the availability of specific performance of non-core governmental powers.[98] It then concluded that because the General Assembly has not expressly allowed a suit for specific performance of non-core governmental powers, no such relief can be granted.[99] In fact, the supreme court in *Wheat Ridge* did not determined whether the General Assembly has such power. The lack of such authorization by the General Assembly, thus, should have no bearing on this issue.

Moreover, *Thompson Creek* failed to account for other instances in which the supreme court has allowed a court to require the government to

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[96] *Id.*
[97] 240 P.3d at 556.
[98] *Id.* at 556.
[99] *Id.*

honor its promises. In *People v. Manning*, 672 P.2d 499, 512 (Colo. 1983), the supreme court held that detrimental reliance on a government promise in the criminal context permitted the court there to fashion the appropriate remedy of specific performance of the promise, noting that such powers are "the essence of equity jurisdiction." And, in *Wheat Ridge*, the supreme court expressly noted that it had allowed a court to order specific performance of promises under an equitable estoppel theory.[100] *Wheat Ridge* did not overrule these precedents.

While the trial court was bound by *Thompson Creek*'s flawed analysis, this Court is not. The supreme court distinguished between core and non-core governmental powers for one reason: because it impacted the court's holding. Here, Plaintiffs seek to compel the County to perform a non-core governmental power; that is, the power to acquire property (and, more specifically, property for open space). *Wheat Ridge* left open the possibility that a court could compel specific performance where a non-core governmental power is involved, such as here, and the supreme court has

[100] 176 P.3d at 745 n.4.

endorsed such action in other cases. Under the facts and circumstances alleged in the complaint, Plaintiffs should have access to the specific performance remedy as provided by the supreme court.

CONCLUSION

The trial court's order dismissing Plaintiffs' claims against the County is based on a misguided and fundamentally flawed interpretation of the agreement between the parties and the complaint's allegations. The trial court's order must be reversed to allow Plaintiffs their day in court.

Dated: June 22, 2018.

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CERTIFICATE OF SERVICE

I hereby certify that on June 22, 2018, I served a true and correct copy of the foregoing **Opening Brief** via Colorado Courts E-Filing on the following:

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