DISTRICT COURT, LARIMER COUNTY, COLORADO 201 LaPorte Avenue, Suite 210 Fort Collins, CO 80521 970-494-3500	DATE FILED: October 12, 2017 6:45 PM FILING ID: D4E1C59175A19 CASE NUMBER: 2016CV30362
Plaintiff(s): LOVELAND EISENHOWER INVESTMENTS, LLC, a California limited liability company, **v.** **Defendant(s):** THE CITY OF LOVELAND, THE GREELEY AND LOVELAND IRRIGATION COMPANY, a Colorado non-profit corporation and JOHN DOES 1 through 50	**▲COURT USE ONLY▲**
Attorney for Defendant The Greeley and Loveland Irrigation Company **OVERTURF McGATH & HULL, P.C.** Mark C. Overturf, # 15188 625 E. 16th Avenue, Suite 100 Denver, Colorado 80203 Telephone: 303.860.2848 Facsimile: 303.860.2869 E-mail: mco@omhlaw.com	Case Number: 2016CV30362 Div.: 4C Ctrm.:

DEFENDANT GREELEY AND LOVELAND IRRIGATION COMPANY'S REPLY IN SUPPORT OF ITS MOTION FOR SUMMARY JUDGMENT

Defendant The Greeley and Loveland Irrigation Company ("GLIC"), by and through its attorneys, Overturf McGath & Hull, P.C., herein submit the following Reply in support of their motion for summary judgment pursuant to C.R.C.P. 56:

I. OVERVIEW

Despite spanning twenty-four pages in length, LEI's Response failed to present competent evidence of a triable issue of fact. Summary judgment remains appropriate

for three reasons. First, irrespective of whether one applies the Colorado Supreme Court case of *Krystkowiak v. W.O. Brisben Cos., Inc.*, 90 P.3d 859, 871 (Colo. 2004)[1], or the Colorado Court of Appeals case of *Slater Numismatics, LLC v. Driving Force, LLC*, 310 P.3d 185 (Colo. App. 2012), there is no genuine issue of material fact as to the absence of intentional and improper conduct sufficient to meet the elements of either claim. Second, as to the intentional interference claim, no contract existed at the time of GLIC's complained of actions; accordingly, there can be no intent to disrupt a non-existent contract. Third, with respect to the contractual expectations or business relations claim, GLIC had an absolute privilege and right to act in its shareholders' interests so long as its conduct was not improper.

II. REPLY

A. LEI's Response Did Not Set Forth Any Competent Evidence Creating a Triable Issue of Material Fact As to Intentional and Improper Conduct

1. Legal Standard

"When, as here, a party moves for summary judgment on an issue on which that party would not bear the burden of persuasion at trial, the moving party's initial burden of production is satisfied by showing an absence of evidence in the record to support the nonmoving party's case. The burden then shifts to the nonmoving party to present sufficient evidence to demonstrate that a reasonable jury could return a verdict for the nonmoving party." *Sanderson v. American Family Mut. Ins. Co.*, 251 P.3d 1213,

[1] Please note that *Krystkowiak* was also favorably cited and followed by the most recent Colorado Supreme Court case on this tort, *Warne v. Hall*, 373 P.3d 588, 595-96 (Colo. 2016).

1216 (Colo. App. 2010), internal citations omitted. "There is no issue for trial unless there is sufficient evidence favoring the nonmoving party for jury to return a verdict for that party; if evidence is merely colorable or is not significantly probative, summary judgment may be granted." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 249-250 (1986). Mere allegations or conclusion in an affidavit unsupported by facts are not competent evidence sufficient to create a factual issue for summary judgment purposes. *Keith v. Kinney*, 140 P.3d 141, 153 (Colo. App. 2005). Mere conjecture is insufficient to defeat summary judgment. *St. Croix v. Univ. of Colo. Health Sciences Ctr.*, 166 P.3d 230, 238 (Colo. App. 2007). Attempting to discredit the testimony of the moving party without offering any concrete evidence on which a jury could reasonably find in favor of the nonmoving party is also insufficient to defeat summary judgment. *Kelly v. Central Bank and Trust Co. of Denver*, 794 P.2d 1037, 1041 (Colo. App. 1989). Mere argument of counsel also does not constitute competent evidence creating a disputed issue of material fact. *Brown v. Teitelbaum*, 830 P.2d 1081, 1084-85 (Colo. App. 1991). Finally, "only disputes over facts that might affect the outcome of the suit under the governing law will properly preclude the entry of summary judgment." *Liberty Lobby*, 477 U.S. at 248.

In sum, in order to defeat summary judgment plaintiff must set forth competent evidence demonstrating material issues of fact such that a reasonable jury might find in their favor. As explained below, LEI's Response has fallen far short of meeting that burden. Summary judgment in GLIC's favor is appropriate.

2. No Competent Evidence of a Material Fact as to Intentional and Improper Conduct

Whether applying the Colorado Supreme Court's decision in *Krystkowiak v. W.O. Brisben Cos., Inc.*, 90 P.3d 859, 871 (Colo. 2004)[2] or the later *Slater Numismatics* Court of Appeals case urged by LEI, all cases agree that intentional and improper conduct is an element of both tort claims LEI has asserted against GLIC. Yet, as set forth in the underlying Motion, LEI's Complaint contained nothing more than conclusory and threadbare allegations of this requisite element of its claims. Beyond the pleadings, even after depositions of the parties have been taken, LEI cannot muster competent specific evidence of any material issue of fact because there is none.

LEI incorrectly asserts that the following constitute competent evidence of genuine issues of material fact:

(i) An unsupported and inaccurate argument of counsel that GLIC misrepresented to LEI the nature of GLIC's dispute with Loveland;
(ii) An immaterial assertion that GLIC failed to take affirmative action to explain to LEI all of the potential impacts of GLIC's dispute with Loveland;
(iii) A factually and legally inaccurate characterization of the Settlement as converting senior water rights to benefit a junior water right user;
(iv) An inaccurate statement of the undisputed facts set forth in GLIC's Motion—incorrectly alleging that GLIC knew that LEI needed Inches converted for municipal use on the Project;
(v) An inaccurate depiction of the immaterial fact that GLIC's general manager was told in 2009 that LEI would not need the irrigation headgate.

Each are discussed in turn below:

[2] LEI's Response acknowledges that *Krystkowiak* remains good law and binding precedent.

(i) Unsupported and Inaccurate Argument

LEI argues, without factual support, that, "Mr. Kahn, misrepresented the nature of the dispute between GLIC and Loveland when he informed LEI a third party return flow dispute existed, placed a hold on all negotiations concerning the recreational trail easement and lifted the hold after being informed by LEI this dispute did not affect LEI's Project." *Response*, p. 18. This unsupported argument of counsel does not constitute competent evidence sufficient to defeat summary judgment. *Brown v. Teitelbaum*, 830 P.2d 1081, 1084-85 (Colo. App. 1991).

Additionally, this argument of counsel is also immaterial. The tortious interference claims pled[3] by LEI against GLIC involve intentional and improper conduct that causes/ induces the third party (Loveland) to breach/fail to perform (or enter into) a contract with plaintiff (LEI). *See, e.g., Slater Numismatics, LLC, supra* (defendant's improper conduct consisted of breach of fiduciary duty to third party, breach of contract with third party, breach of duty of confidentiality owed to third party, breach of duty of loyalty to third party, all of which caused the third party to be unable to perform the contract with plaintiff). *See also, Warne v. Hall, supra* (while found conclusory and threadbare, allegations involved defendant's actions in opposing

[3] In its Response, LEI refers to a separate form of the tort, "Intentional Interference with Another's Performance of *His Own* Contract," under Restatement (Second) of Torts Section 766A. As the title implies, and as LEI notes in its Motion, this Restatement finds narrow application only where a *plaintiff's* own performance of his contract is frustrated by the actions of the defendant. LEI has not pled any such claim. Rather, its Complaint alleges breach by the City, and alleges that GLIC's conduct "has induced or otherwise caused the City not to perform…" *Complaint*, Para. 90.

building plans of third party, and the resulting inability of the third party to perform its contract with plaintiff). Any unsupported allegations of misrepresentation by GLIC toward LEI are therefore wholly irrelevant to the specific tort claims pled against GLIC at issue here. LEI has utterly and completely failed to allege or prove that GLIC engaged in any wrongful act that caused Loveland not to perform a contract or enter into business dealings with LEI! Summary judgment is therefore appropriate as there is no evidence that an alleged misrepresentation by GLIC to LEI induced Loveland to breach or fail to perform its contract with LEI.

Finally, the unsupported legal argument in the Response is also inaccurate. There was no "misrepresentation" by GLIC to either LEI or Loveland. The sentence following LEI's argument references an affidavit by Ms. Beck (Exhibit E to the Response). *See Response*, p. 18. However, Ms. Beck makes no such factual accusation in her affidavit. *See Ex. E.* Mr. Kahn's August 20, 2009 letter (attached to Exhibit E to the Response, and attached again here again as **EXHIBIT 1**), addressed to Ms. Beck and the City of Loveland, in fact states:

> There is an ongoing dispute between GLIC and the City of Loveland concerning return flows after Loveland's use for the Barnes and Chubbuck water rights. I am attaching a letter dated September 10, 2008 to the City Manager for the City of Loveland concerning issues with the City….

The September 10, 2008 letter attached thereto (and attached again here as **EXHIBIT 1**) states, in relevant part:

> The purpose of this letter is to make you aware that another department of the City, the Water Department, is working at cross purposes.... In 1977, the Company and the City of Loveland entered into two agreements…by which the Company allowed the City to change for its uses certain

> contract water rights historically irrigated lands that had been annexed into the City. Absent such permission from the Company, it is likely that Loveland would not have been able to change these rights for municipal use…The Company has recently asserted its right to the return flows pursuant to the agreements. In response, the City has taken the position, in the water court in Greeley in Case No. 02CW392, that the Company is no longer entitled to the use of the return flows…

The letter concludes by stating, "I am writing this letter in an attempt to resolve differences in the water court case between the City and the Company outside of court…" Thus, not only is everything in the letter factually accurate (and not a misrepresentation), but also put LEI on notice of all information, <u>including the water court case number</u>, regarding the dispute that may impact owners of Chubbuck Inches.

LEI asserts, "GLIC notably failed to mention the issues on litigation could render LEI's Chubbuck Inches worthless for the development. *Exhibit E*, Beck Affidavit at 5-14." *Response*, p. 18. Beck is a licensed Colorado attorney. She was told the nature of the dispute, the case number and court where the dispute was pending. (GLIC could lead LEI to water, but it couldn't force it to drink). After being provided the letter, it was LEI's sole responsibility to read the letter, and take whatever action it deemed necessary to protect its interests, and ask questions, which it did not. Mr. Kahn's letter was the opposite of misrepresentation or any other improper conduct, it was full disclosure of what was happening at the time. In August of 2009 when Mr. Kahn wrote the letter, Chubbuck Inches were still eligible for banking with Loveland, so there was nothing to "mention" as Beck states. Second, even today, Chubbuck Inches can still be used for development, just not for municipal conversion. Parks and green belts can still be irrigated, so there is no basis for a claim they are 'worthless.'

(ii) Immaterial Assertion that GLIC did Not Explain Import of Dispute to LEI

LEI implies that GLIC owed it a duty to take further affirmative action on behalf of LEI. LEI argues, "GLIC never asked LEI if it had in fact banked its Inches, and did not inform LEI it was negotiating with Loveland to prevent future conversions. *Exhibit* **C**, Parker Affidavit at 24, 28; *Exhibit D*, Owen Affidavit at 23; *Exhibit E*, Beck Affidavit at 13-14; *Exhibit F*, Brinkman Depo. At 47:4-6." *Response*, p. 18. First, this information was not relevant to GLIC so there was no business reason to ask LEI such questions. Second, LEI cites no legal authority for the implied proposition that GLIC owed LEI a legal duty or obligation to explain the potential impact to LEI of GLIC's dispute with Loveland. Third, LEI was a sophisticated, experienced real estate developer that had retained lawyers and consultants and was fully able to discern for itself land and water issues the might affect its interests. *See Ex. 3*, *Parker deposition*, 10-14, 174:21-24. Based upon the information that had been provided to it by GLIC in Mr. Kahn's letter, no reasonable person could ever believe LEI was too naive to understand what was happening. LEI certainly could have asked further questions of Loveland or GLIC regarding the water court dispute, but did not. *See Ex.1. See also, Ex. 3, Parker deposition,* 30-33, and 62.

(iii) Factually and legally inaccurate characterization of the Settlement as converting contractually senior water rights to benefit a junior water right user

LEI's Response makes the following factually and legally incorrect assertion: "Mr. Kahn then negotiated the Settlement such that it would intentionally strand

Chubbuck Inches that were contractually senior to its shareholders' rights, thereby converting those rights to benefit a junior water right user. *See* Email from Jeff Kahn dated December 29, 2009 attached as *Exhibit K*." *Response*, p. 18. The Settlement does not convert contractually senior water rights to junior users. The contractually senior water rights in agricultural water remain. None of these rights were "converted" to junior users. The right to use the water by shareholders, after the Contact users, has been in existence since 1877, and that structure remains intact under the Settlement Agreement. LEI and all others who possess Chubbuck Inches may still call upon the full right of delivery of agricultural water. Exhibit K to the Response, Mr. Kahn's December 29, 2009 e-mail, cited by the Response in support of the inaccurate characterization of the Settlement, does not state anything different. *See Ex. K.* To the extent that LEI feels it has been "stranded" and unable to convert its Inches to another form, it is solely the result of LEI's own delay and failure to bank its Inches at any point in time between 2004 when it bought the property, and 2010, when the Settlement Agreement was reached.

(iv) Inaccurate statement of the undisputed facts set forth in GLIC's Motion – incorrectly alleging that GLIC knew that LEI needed Inches converted for municipal use on the Project

LEI also argues, "it is undisputed Mr. Brinkman knew LEI had Chubbuck Inches and knew they needed these Inches converted for municipal use on the Project." *Response*, p. 18. In support of this blatantly inaccurate assertion, LEI cites Undisputed Fact No. 16 ('UF16') in GLIC's Motion. *Id.* UF16 does not state that Mr. Brinkman knew

that LEI needed its Inches for the Project. UF16 in fact states ***the opposite***. UF16 is as follows:

> "Mr. Brinkman was aware LEI intended to develop the property; but ***did not know*** whether LEI intended to use Chubbuck Inches for the development. (**Exhibit D**, p. 20:1-16). Mr. Brinkman also assumed that LEI had turned over the water to the Loveland water bank because LEI had purchased the land so long ago. (**Exhibit D**, p. 46:25- 47:6)."

(emphasis added). The misrepresentations of LEI's Response aside, there is zero evidence that GLIC acted with the intent and improper purpose of preventing LEI from converting Inches, or of preventing Loveland from satisfying supposed contractual expectations of others. In addition to Mr. Brinkman's testimony above, all other sworn affidavits and sworn deposition testimony indicate that GLIC in fact had no knowledge that the Settlement would have this effect on LEI. Mr. Kahn did not know LEI had Chubbuck Inches when his 2009 letter (Ex. 1) was sent or any other time. *Deposition of Jeffrey Kahn*, excerpts attached hereto as **Exhibit 2**, 124:8-13. Mr. Kahn further testified that neither the GLIC Board, nor Mr. Kahn personally, knew who the remaining owners of the Chubbuck Inches were in 2009. *Ex. 2*, 133:1-10. Mr. Gregory Parker, the Rule 30(b)(6) designee for LEI, testified that no one from LEI had ever told him that they had discussions with anyone at GLIC "about LEI's intent or need to use Chubbuck Inches to proceed with its project before the settlement agreement was entered into with GLIC and Loveland." *C.R.C.P. 30(b)(6) Deposition of LEI*, excerpts attached hereto as **Exhibit 3**, 43:18-25; 57:1-5. It is thus undisputed that GLIC did not know whether LEI planned to convert Chubbuck Inches for its Project, or whether LEI had banked its Chubbuck

Inches prior to the Settlement. Absent such knowledge, it is not possible for GLIC to have acted intentionally and improperly to disrupt LEI's contractual expectations.

(v) The immaterial fact that GLIC was told in 2009 that LEI would not need the irrigation headgate.

In support of its argument that a genuine issue of fact regarding intentional and improper conduct exists, LEI's Response states that, "in 2009, Mr. Brinkman and LEI engineer, Larry Owen, visited the LEI Land to discuss Chubbuck Inches and Mr. Brinkman specifically asked if LEI would be using its Chubbuck Inches for irrigation. *See* **Exhibit F**, Brinkman Depo. at 23:4-28:5. He was told it would not. *Id*." *Response*, p. 19. A triable issue of fact is not created by this assertion.

First, the Response does not accurately set forth the facts. The meeting between Mr. Brinkman and Mr. Owen was not to discuss Chubbuck Inches, but rather to discuss headgates and laterals on LEI's property. *Ex. F*, Brinkman Depo, 23:4-10. LEI wanted to know if it might be possible to move headgates and laterals that might impact their planned development. *Id.* at 24:24 – 25:15. Additionally, the conversation did not involve Mr. Brinkman asking any specific questions regarding LEI's Chubbuck Inches. Mr. Brinkman simply asked if "they intended to do any irrigation of the site after development," and "he told me there was no plans to do any irrigation." *Id.* at 28:24 - 29:3. Counsel then specifically asked if Mr. Brinkman assumed LEI would use their Chubbuck Inches for development, and he answered in the ***negative***. He said, "I didn't assume anything. I just asked whether they were going to irrigate, because our only concern is whether that headgate had to stay active." *Id.* at 28:6-13.

Even if Mr. Brinkman's sworn testimony could be flipped on its head to mesh with counsel's argument, it is immaterial whether he knew that LEI did not plan to irrigate their Project. This still does not alter the undisputed and undisputable fact that GLIC did not know whether LEI intended to convert its Chubbuck Inches for its Project, or whetherLEI had banked its Chubbuck Inches prior to the Settlement Agreement.

B. Existence of a Contract *at the Time of* the Alleged Intentional and Improper Conduct is Essential to a Claim of Tortious Interference with Contract

In order for one to intentionally and improperly interfere with a contract, there must be a contract in existence at the time of the defendant's conduct. Here, it is undisputed the Settlement Agreement was entered into before LEI' Annexation Agreement. It is highly illogical for LEI to argue that its contract could be interfered with before it existed. The Response misconstrues the Restatement when arguing otherwise. The bold italicized portion of Restatement Section 766, cmt f, cited by LEI's Response[4], simply refers to the fact that the contract must still continue to be in force and effect at the time of the breach in order to give rise to a cause of action. Comment (f) to the Restatement is entitled "Voidable Contracts." It states that, "if for any reason [the contract] is entirely void, there if no liability for causing its breach." In other words, if the contract was not in existence at the time of the alleged conduct, there is no claim.

[4] "[t]he particular agreement must be in force and effect ***at the time of the breach that the actor has caused***…." *Id*. (emphasis added); *see also Jewel Companies*, *Inc. v. Pay Less Drug Stores Northwest*, *Inc.*, 510 F. Supp. 10006, 1011 (N. D. Ca. 1981) (same).

Notably, Comment (f) to Section 766 of the Restatement also states that the contract "must be applicable to the particular performance that the third person has been induced or caused not to discharge." Thus, contrary to LEI's assertion, the fact that the Annexation Agreement does not contain an express provision requiring the conversion of agricultural to municipal water is of central relevance. Without a contractual provision requiring such conversion, LEI has no claim. LEI argues that it had an expectation that Loveland would interpret and apply its City Code in a certain manner, and that this expectation should somehow be inferred as a provision in the Annexation Agreement. Even if this were a legal possibility, it does not give rise to a claim against GLIC. There is no legal claim against a third party for intentional interference with interpretation and application of City Code provisions.

C. GLIC Has a Right to Act in its Own Self-Interests Even if the Result is Disruption of Another's Contractual Expectations, As Long as GLIC's Conduct Was Not Improper

In order for a defendant to be liable for intentional interference with prospective business expectancy, the defendant's interference must be both intentional and improper. *Restatement (Second) Torts § 766B*. As discussed above, there is no evidence of intentional and/or improper conduct by GLIC. It is correct that *Warne v. Hall*, 373 P.3d 588, 596 (Colo. 2016) states that determination of impropriety is "dependent upon context and circumstances." However, *Warne* dealt with interference with a contract, and not a contractual expectation. As the Restatements and Colorado case law acknowledge, a party to a contract has a greater legal interest to protect, and thus there is a lower threshold of intentional improper conduct required to give rise to a claim.

*See, e.g., Restatement (Second) Torts § 766B, Comment e (*The fact that the interference is not with a subsisting contract but only with a prospective relation not yet reduced to contract form is, however, important in determining whether the actor was acting properly in pursuing his own purposes…when the means adopted is not innately wrongful and it is only the resulting interference that is in question as a basis of liability, the interference is more likely to be found to be not improper.) Irregardless, there is no triable issue of fact as there is no evidence of improper conduct by GLIC. GLIC did not lie to Loveland or LEI. GLIC did not steal confidential information. GLIC did not slander anyone. GLIC did not threaten anyone. Additionally, as set forth below, GLIC's conduct was privileged.

The privilege afforded by Restatement (Second) Torts § 768 does in fact find application here. LEI's suggested reading is too narrow. Section 768 allows interference with the contractual expectations of a competitor as long as the defendant does not employ wrongful means[5], defendant's actions do not create an unlawful restraint of trade, and defendant's purpose is at least in part to advance his interest in competing with the other. Although GLIC and LEI are not direct business competitors, here they are competiting for interests in a scarce resource—water rights. Each has the right in our commercial society to take actions to preserve their interests, and those of their shareholders, in that resource, providing they do not employ wrongful means. Comment c to Section 768 expressly states that the "rule stated in this Section applies

[5] As set forth in the Motion, 'wrongful means' is very narrowly defined as separately tortious conduct. There is no evidence whatsoever that GLIC's committed separately tortious conduct (i.e. fraud, threat of litigation, breach of fiduciary duty, assault) in obtaining the Settlement Agreement with Loveland.

whether the actor and the person harmed are competing as sellers or buyers, or in any other way, and regardless of the plane on which they compete," and states the rule applies when the parties are competing in the market for a particular resource. The policy rationale of this Rule and its privilege certainly find application where a ditch company employs proper means in order to protect the interests of its shareholders in agricultural water needed to sustain their crops, and a critical aspect of the Colorado economy.

III. CONCLUSION

LEI's Response has failed to provide any specific competent evidence demonstrating the existence of a genuine issue of material fact. Under the undisputed facts of this case, LEI cannot meet any of the elements of its claims for intentional interference with contract, or intentional interference with prospective business advantage. Summary judgment in GLIC's favor is therefore appropriate.

WHEREFORE, Defendant The Greeley and Loveland Irrigation Company respectfully requests that this Court find that the material facts are not in dispute, and Order that GLIC is entitled to summary judgment in its favor, and award it costs, and other such relief as the Court may deem appropriate.

Respectfully submitted this 12th day of October, 2017.

OVERTURF MCGATH & HULL, P.C.

s/ Mark C. Overturf

Mark C. Overturf
Attorney for Defendant The Greeley and Loveland Irrigation Company

CERTIFICATE OF SERVICE

I hereby certify that on the 12th day of October, 2017, a true and correct copy of the foregoing **DEFENDANT GREELEY AND LOVELAND IRRIGATION COMPANY'S REPLY IN SUPPORT OF ITS MOTION FOR SUMMARY JUDGMENT** was served electronically addressed to the following:

Kathryn I. Hopping
Darrell G. Waas
Waas Campbell Rivera Johnson & Velasquez LLP
1350 Seventeenth Street, Suite 450
Denver, CO 80202

Josh Marks
Mary Sue Greenleaf
Berg Hill Greenleaf Ruscitti, LLP
1712 Pearl St, Boulder, CO

s/ January D. Allen