DISTRICT COURT, LARIMER COUNTY, COLORADO 201 LaPorte Avenue, Suite 210 Fort Collins, CO 80521 970-494-3500	
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 MOTION FOR SUMMARY JUDGMENT

Defendant The Greeley and Loveland Irrigation Company ("GLIC"), by and through its attorneys, Overturf McGath & Hull, P.C., herein move for summary judgment pursuant to C.R.C.P. 56, as set forth below:

I. OVERVIEW

This case involves competing interests in the use of water. GLIC has owned the Chubbuck water rights in question since its predecessor in interest purchased them in

1877. As part of this sale, original owners were given a contact right to irrigate with "Chubbuck Inches". One hundred years later, in 1977, GLIC and the City of Loveland ("Loveland") entered into an agreement in an attempt to accommodate urban growth in the area. Under the agreement, Loveland could petition the water court for conversion of Chubbuck agricultural water to municipal use. Loveland would use the water, then return it to GLIC. A dispute arose when GLIC was not receiving the return flows. After a lengthy water court dispute, the issues were settled in January 2010 (*Settlement Agreement*, **Exhibit A**). As part of the Settlement Agreement, Loveland would no longer convert Chubbuck ditch water for municipal use. (**Exhibit A, ¶ 6**).

Plaintiff LEI purchased farm land in 2004 that had associated Chubbuck Inches for agricultural use. The Settlement Agreement does not change Plaintiff's entitlement to continued irrigation on its land. But the Settlement Agreement eliminated Loveland's municipal water "conversion" process that existed from 1977 until the Settlement Agreement. Plaintiff may still develop its property. Plaintiff may still irrigate its land. It simply cannot use its Chubbuck agricultural water to fulfill Loveland's municipal water supply requirement for annexed property.

GLIC and Loveland had the right to enter into the water court settlement. Plaintiff has no right to use the Chubbuck water for future municipal use.

UNDISPUTED FACTS

1. In 1865, Harrison Chubbuck constructed the "Chubbuck Ditch" and made initial appropriations of water from the Big Thompson River near what is now the City of Loveland. (*Complaint* ¶10, **Exhibit B**).

2. On November 1, 1877, Mr. Chubbuck entered into an agreement (*Chubbuck Agreement*, **Exhibit C**) with the Larimer County Irrigating and Manufacturing Company, GLIC's predecessor in interest. Under this agreement, Chubbuck Ditch was enlarged and extended east for the benefit of other water users. (*Complaint* ¶11, **Exhibit B**).

3. Pursuant to the Chubbuck Agreement, Chubbuck was guaranteed first priority for deliveries under the Chubbuck Ditch system ("Contract Users"). These contractual rights to Chubbuck water are specified in "Inches" and were to be delivered ahead of the company's shareholders. Any Chubbuck Inches not needed by the Contract Users were available for use by the Company's other shareholders. (*Complaint* ¶12, **Exhibit B**).

4. All Chubbuck Inches were used for irrigation purposes. As time passed, Loveland grew, and the need for municipal water increased.

5. In 1977, Loveland and GLIC reached an agreement that allowed Loveland to convert Chubbuck Inches for municipal use. The plan was, after the water was used by Loveland, any effluent was to be returned to GLIC (*Deposition of Ronald Brinkman*, p. 29:33-30:16, **Exhibit D**).

6. Loveland began acquiring Chubbuck Inches from Contract Users and converting them through water court proceedings from agricultural to municipal use. Loveland created a "Water Bank" whereby a developer like LEI could transfer water rights to the city in satisfaction of the water requirements for development. (*Loveland Municipal Code*, ("LMC") Ch. 19.04.015, **Exhibit E**). After a Contract User deposited its Inches into the Water Bank, the City provided a reciprocal amount of municipal water. The City then held the Inches in the Water Bank until a sufficient amount accrued that

the lengthy and expensive water court action for the conversion from agricultural to municipal use made economic sense (*Complaint* ¶21-22, Exhibit B).

7. By 2002, GLIC was not receiving the return flows it expected as part of the 1977 agreement with Loveland. (*Deposition of Gregory Lee Dewey*, p. 74:10 - 75:1, **Exhibit F**; *Brinkman*, **Exhibit D**, p. 29:23 - 30:16). When Loveland petitioned the Water Court for conversion of additional Chubbuck Inches in Water Court case 2002CW392, GLIC objected. (*Deposition of Jeff Kahn*, 112:11- 113:19, **Exhibit G**).

8. In order to settle the matter, GLIC and Loveland entered into an agreement January 25, 2010 (the "Settlement Agreement", Exhibit A), in which Loveland committed that it shall not apply for changes of any additional Chubbuck Inches and GLIC agreed to waive its claim under the 1977 agreement for return flows from water already changed. (**Exhibit G,** p. 113:10- 15; *see also*, **Exhibit A**).

9. Loveland, not GLIC, proposed the concept of ending Chubbuck Inches conversions, in order to settle the Water Court case (**Exhibit G**, p. 167:1—25).

10. Meanwhile, LEI, a California land speculator, purchased approximately 58 acres from 2001 to 2007. LEI purchased the Glick Farm in 2004. (*Parker deposition*, p. 11:13- 12:5, **Exhibit H**) The Glick Farm had historically been irrigated with Chubbuck Inches, and the purchase included this water. (*Parker deposition*, p. 18:18-19:7, **Exhibit H**).

11. LEI desired to develop the land it purchased. (*Complaint*, ¶ 29, **Exhibit B**). The Glick Farm was located outside of the city limits, and needed to be annexed by Loveland. (*Complaint* ¶30, 31, **Exhibit B**). And, in order to develop the property,

Loveland required developers to supply sufficient water for the proposed development (*LMC* Ch. 19.04 et seq., **Exhibit E**).

12. LEI never transferred the Chubbuck Inches it acquired with the Glick Farm to Loveland's Water Bank. (**Exhibit H**, p. 20:25- 21:3).

13. On April 20, 2010, Loveland and LEI entered into an Annexation and Development Agreement (*Annexation Agreement*, **Exhibit I**) wherein Loveland and LEI agreed that the land would be annexed into the City. (**Exhibit I)**.

14. Pursuant to LMC, 19.04.090[1] "[T]he water rights owed by an application ... shall be calculated in accordance with the water rights provisions in effect on the date application's right to develop was vested . . ." (Emphasis added.) (*See §19.04.090,* **Exhibit E)**. The calculation of the water rights owed is distinct from the satisfaction of the payment of the water rights requirement. Therefore, the calculation of the water rights owed by LEI for the Project is based on the Code in effect as of April 20, 2010, the date the Annexation Agreement executed. However, satisfaction of the payment of the water rights requirement (clearly distinct from the calculation of the requirement) is based on the Code at the time the obligation to pay such requirement arises. (*Dewey deposition*, p. 197:1- 199:17, **Exhibit F**; *LMC* § 19.04.040 for satisfying, and § 19.04.090 for calculating, **Exhibit E, E.1, E. 2, E.3**). Furthermore, the acceptance of Chubbuck water to satisfy a water rights requirement or for a water bank contribution was and is subject to the Loveland

[1] The code in effect at the time the Annexation Agreement was entered was the 2009 version, excerpts of which are attached hereto as Ex. E. Subsequent versions of the code are attached as Ex. E.1, E.2, and E.3.

Utility Commission's absolute discretion. (¶ 1.1.12, 2.3.1.4, 2.19 and 2.28 of the *Annexation Agreement,* **Exhibit I**).

15. In 2008, LEI and GLIC met to discuss easement issues over the property if it were to be annexed and developed. (**Exhibit G**, p. 36:22- 44:25).

16. Ron Brinkman, GLIC General Manager, assumed LEI obtained Chubbuck Inches when it purchased the property because the water use was tied to the land. 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).

17. Before the 2010 Settlement Agreement, LEI never mentioned to GLIC how water would service LEI's development. (**Exhibit G**, p. 97:11- 98:3). GLIC had no knowledge of the specifics of LEI's concept Master Plan submission, or its subsequent Annexation Agreement (**Exhibit G**, p. 192:16- 193:5).

18. In 2014, LEI learned its Chubbuck agricultural water would not be accepted by Loveland to meet LEI's municipal water obligations. (*Complaint*, ¶ 56, **Exhibit B**; *See also*, **Exhibit H**, p. 25:5-18).

II. SUMMARY JUDGMENT STANDARDS

Once the movant meets his initial burden of showing entitlement to relief under C.R.C.P. 56, the burden shifts to the responding party to come forward with competent evidence showing the existence of a genuine issue of material fact that would preclude

summary judgment. *Snook v. Joyce Homes, Inc.*, 215 P.3d 1210, 1218 (Colo. App. 2009); *McDonald's v. Zions First National Bank, N.A.*, 348 P.3d 957, 966 (Colo. App. 2015); *GTM Investments v. Depot, Inc.*, 694 P.2d 379, 381 (Colo. App. 1984).

III. ARGUMENT

A. Tortious Interference Claims

Plaintiff has asserted both a tortious interference with contract claim, and a tortious interference with prospective business claim. The elements of the claims overlap, with the only difference being that the former requires the existence of a fully formed contract between the Plaintiff and a third party. *See, e.g., Watson v. Settlemeyer*, 372 P.2d 453 (Colo. 1962) (plaintiff wholly deprived of benefit of distributorship contract by actions of defendant). The latter, by contrast does not require a showing that an underlying contract exists, but, rather the Plaintiff must show that intentional and improper interference prevented consummation of a sufficiently definite contractual expectation. *Harris Group, Inc. v. Robinson*, 209 P.3d 1188, 1196 (Colo. App. 2009), internal citations omitted. *See also, MDM Group Associates, Inc. v. CX Reinsurance Co., Ltd.*, 165 P.3d 882, 886 (Colo. App. 2007); *Klein v. Grynberg*, 44 F.3d 1497, 1506 (10th Cir. 1995) (must be something beyond a mere hope; a firm offer is required).

1. An Actionable Claim for Tortious Interference with Contract Does Not Exist Under the Undisputed Facts of this Case

"To be liable for intentional interference with contract, a defendant must (1) be aware of a contract between two parties, (2) intend that one of the parties breach the contract,

and (3) induce the party to breach or make it impossible for the party to perform the contract." *Krystkowiak v. W.O. Brisben Cos., Inc.*, 90 P.3d 859, 871 (Colo. 2004)[2].

a. Plaintiff Had No Contract with the City

Existence of a contract on the subject matter covering that express subject matter is required in order to state a claim for tortious interference with contract. *See, e.g., Radiology Professional Corp. v. Trinidad Area Health Ass'n*, 577 P.2d 748, 751 (Colo. 1978) (petitioner alleged tortious interference when third party also began doing business with defendant; however, petitioner could not recover for tortious interference because the agreement was nonexclusive and had not been breached). The requirement for a specific contractual promise covering the subject matter is further reflected in first element of the approved Colorado Civil Jury Instruction, No. 24:1, which states:

> 1. The plaintiff had a contract with third person in which third person agreed to (*describe the substance of the promise the defendant allegedly interfered with*);

(emphasis added).

Here, the contract with which Plaintiff alleges intentional interference is its Annexation Agreement, entered into April 20, 2010 (*Facts* #13 above; *Complaint* ¶89; **Exhibit B**). However, the action that Plaintiff alleges caused interference was the Settlement Agreement between GLIC and the City; an agreement that was entered into January 25, 2010, four months before the Annexation Agreement came into existence. (*Facts* #8). Accordingly, Plaintiff's claim fails as it is a factual impossibility for GLIC's Settlement Agreement to have interfered with a contract that did not exist.

[2] In *Int'l Academy of Business and Financial Mgmt., Ltd. v. Mentz*, 2013 WL 3771288 (D. Colo. 2013), the United States District Court for the District of Colorado declined to apply earlier case law which suggested elements of a tortious interference claim, and held the 2004 *Krystkowiak* case correctly set forth the elements.

Additionally, even if GLIC had knowledge of Plaintiff's development plans, its conduct did not induce or cause a breach. In *Baker v. Carpenter*, 516 P.2d 459, 461 (Colo. App. 1973), the Colorado Court of Appeals stated:

> "One does not induce a [third party] to breach a contract with a [plaintiff] when he merely enters into an agreement with the [third party] with knowledge that the [third party] cannot perform both it and his contract with the [plaintiff]. In order to establish the alleged tort, a plaintiff must prove, inter alia, that the actions of the defendant actually induced a breach of the contract."

At no time did Plaintiff have a contract covering the express subject matter of conversion of agricultural water to municipal water. The Annexation Agreement does not require conversion of Chubbuck Inches, it merely states that the City shall "provide its customary municipal services…including…water service and facilities." (*Complaint*, ¶ 43, **Exhibit B)**. The Annexation Agreement does not speak to water rights or the Plaintiff's means of acquisition of the same. (*Facts* # 13; **Exhibit B**). The absence of a contract provision requiring the City to convert Chubbuck Inches to municipal water rights is fatal to the Plaintiff's claim for tortious interference with contract. *See Pierce v. St. Vrain Valley School Dist. RE-1J*, 944 P.2d 646, 651 (Colo. App. 1997), rev'd on other grounds (claim for tortious interference with contract required the existence of a valid contract provision). Under *Krystkowiak, supra*, and jury instruction 24:1, the first element of a claim for tortious interference is knowledge by the defendant of a contract between Plaintiff and a third party covering the subject matter—here conversion of Chubbuck Inches. Where no such contract existed, GLIC could not have knowledge of it. Accordingly, summary judgment is respectfully requested in GLIC's favor on this claim.

b. There Has Been No Breach of Plaintiff's Annexation Agreement with the City

In addition to the fact that there was no contract covering the subject matter (conversion of Chubbuck Inches), there was no breach of the contract. Plaintiff may still proceed with its development under the Annexation Agreement. Plaintiff's own Complaint acknowledges that it can still develop, it simply must find another source of municipal water rights for the development. (*Complaint*, ¶ 61-62, **Exhibit B)** (discussing increased costs of development). Gregory Parker, Plaintiff's 30(b)(6) witness, testified nothing is preventing it from developing its property if it wishes (**Exhibit H**, p. 25:16-26:17; 101:1-7). As set forth in *Krystkowiak, supra*, and C.J.I. Civ. 24:1, breach or failure of performance is a requisite element of a claim for tortious interference with contract. Nowhere in the case law or approved jury instructions does it state that a mere increase in the cost of contract performance give rise to a claim.

c. No Intentional Interference or Improper Conduct by GLIC

Plaintiff's claim also fails because GLIC did not intentionally interfere; nor more critically, did it act by improper means. *See* *Harris Group, Inc. v. Robinson* 209 P.3d 1188, 1195–96 (Colo.App.2009).

i. No Intentional Interference

The third element of a claim for tortious interference in Colorado Jury Instruction—Civil (4th) 24:1 is that: "the defendant by words or conduct, or both, *intentionally* caused third party [not to perform][to terminate] its contract with the

plaintiff, or interfered with third party's performance of the contract thereby causing third party [not to perform][to terminate] the contract with the plaintiff." (emphasis added). Colorado Jury Instruction—Civil (4th) 24:2 defines 'intentional conduct' in relevant part as: "conduct is intentional if a person acts or speaks for the purpose, in whole or in part, of bringing about a particular result, or if a person knows his or her acts or words are likely to bring about that result." Comment (i) to *Restatement (Second) of Torts* Section 766 regarding intentional interference with contract, clarifies that, "to be subject to liability under the rule stated in this Section, the actor must have knowledge of the contract with which he is interfering and of the fact that he is interfering with performance of the contract." Comment (d) to Section 767 states, "since interference with contractual relations is an intentional tort, it is required that…the injured party show that the interference with his contractual relations was either desired by the actor or known by him to be a substantially certain result of his conduct." This typically boils down to a showing that the actor was motivated, in whole or in part, by a desire to interfere with the other's contractual relations. For example, in *Watson v. Settlemeyer*, 372 P.2d 453, 455 (Colo. 1962), one of the factual considerations by the court was the inclusion in the contract between the third party and the defendant discussing intent to terminate the contract rights of the plaintiff: "[third party] has now taken steps to discontinue any right of [plaintiff]…to continue as the distributor of said product." No factual allegations have been made of any such conduct by GLIC. Significantly, it was Loveland, not GLIC, that proposed the concept of ending Chubbuck Inches conversions, in order to settle the Water Court case (**Exhibit G**, p. 167:1—25).

ii. No Improper Means Employed

The goal to be achieved by the torts of intentional interference with an existing contract or prospective business relation is to protect the integrity of contracts; however, that interest is not absolute, and must be balanced against the interests of the parties and society. *Harris Group, Inc. v. Robinson*, 209 P.3d 1188, 1196 (Colo. App. 2009). Accordingly, "to achieve the balance between protecting contracts and preserving privileges, a plaintiff must show more than that a defendant intentionally interfered with an existing contract or with prospective contractual relations. There must also be proof that such interference was 'improper.'" *Id.*, citing, *Restatement (Second) of Torts*, §767. Consideration is given to the following factors in determining whether interference was 'improper':

(a) The nature of the actor's conduct;
(b) The actor's motive;
(c) The interests of the other with which the actor's conduct interferes;
(d) The interests sought to be advanced by the actor;
(e) The social interests in protecting the freedom of action of the actor and the contractual interests of the other;
(f) The proximity or remoteness of the actor's conduct to the interference; and
(g) The relations between the parties.

Restatement (Second) of Torts, §767.

Here, the nature of GLIC's conduct was to permissibly protect its interests in a water court proceeding. (*Complaint,* ¶¶ 24-26, **Exhibit B**; *See Facts*, ¶ 7). Its intent was to protect the interests of its shareholders in the remaining agricultural water rights. (*Complaint*, ¶¶ 24-25, **Exhibit B**). In contrast, at the time of the Settlement Agreement, the Plaintiff had no vested interest. Plaintiff's Annexation Agreement was not reached

until four months after the date of the Settlement Agreement. (**Exhibit I** *and* **Exhibit A**). Furthermore, GLIC had no knowledge that Plaintiff had not banked its Chubbuck Inches six years earlier when Plaintiff purchased the associated farm land. (*Facts* #16). Significantly, even if GLIC's motivation was to manipulate Loveland into preventing Plaintiff from converting its Chubbuck agricultural water rights, GLIC's conduct is still privileged. A review of the factors under *Restatement (Second) of Torts*, §767 demonstrates that GLIC's conduct was not 'improper.'

An example of when Colorado courts have been willing to find 'improper conduct' has been when the actor had no legitimate business purpose, but was acting solely out of a desire to harm the party. *See, e.g., Preston v. Atmel Corp.*, 560 F.Supp.2d 1035, 1039 (D. Colo. 2008); *Trimble v. City and County of Denver*, 697 P.2d 716, 726 Colo. 1985). In *Warne v. Hall*, 373 P.3d 588 (Colo. 2016), the Colorado Supreme Court found that a landowner's claim that town mayor intentionally interfered with purchase agreement through inducing a breach of the agreement or effectively making the purchase impossible, by improperly imposing conditions on a development plan that were not agreeable to prospective purchaser, did not entitle landowner to relief, absent plausible allegations suggesting mayor was acting out of unrelated personal animus toward landowner or to the detriment, rather than benefit, of the town for personal reasons. No allegations of improper motive or personal animus were made in Plaintiff's Complaint[3]. As set forth above, GLIC was permissibly acting in the interests of its

[3] Pursuant to *Warne v. Hall, supra*, Plaintiff's allegations in ¶¶ 57-60 of the Complaint actually allege a legitimate business reason for GLIC's actions- "soley to benefit the Non-Party shareholders…."

shareholders, and was not acting out of animus toward Plaintiff. Accordingly, summary judgment is appropriate on Plaintiff's claim for tortious interference with contract.

2. *An Actionable Claim for Tortious Interference with Prospective Business Advantage Claim Does Not Exist Under the Undisputed Facts of this Case*

Plaintiff also asserts the related claim of intentional interference with a prospective business advantage. Plaintiff claims that GLIC was aware of a valid business expectancy between City and LEI, and interfered. "To establish a claim for tortious interference with prospective business advantage, a plaintiff must show that the defendant engaged in (1) improper conduct with (2) the intention to induce or cause a third party not to enter into or continue business relations with the plaintiff, and (3) defendant actually induced or caused such a result." *Nobody in Particular Presents, Inc. v. Clear Channel Communications, Inc.*, 311 F.Supp.2d 1048, 1117-1118 (D. Colo. 2004). In other words, is intentional and improper interference preventing the formation of a contract. *Dolton v. Capitol Fed. Sav. & Loan Ass'n*, 642 P.2d 21, 23 (Colo. App. 1981).

a. <u>No Intentional Interference</u>

As with interference with contract, the intentional nature of this tort requires that the defendant had knowledge of the prospective contract or business relationship, and acted with the intent to disrupt it. *See Harris Group, Inc. v. Robinson*, 209 P.3d 1188, 1195 (Colo. App. 2009). Here, while GLIC had some knowledge that Plaintiff was planning to develop, it had no knowledge that Plaintiff had not banked its Chubbuck Inches when they were first acquired. (*See Facts #16)*. And, it was Loveland, not GLIC, that proposed

no further conversion of Chubbuck Inches for municipal use. (*Facts* # 9). For this reason, the requisite element of intentional interference cannot be proven on Plaintiff's tortious interference with prospective business advantage claim. Summary judgment in GLIC's favor is appropriate, and is respectfully requested.

b. No Improper Means/GLIC's Conduct Privileged

As discussed above on Plaintiff's tortious interference with contract claim, GLIC employed no wrongful means in entering into the Settlement Agreement with the City. Nor does the Plaintiff allege anywhere in its Complaint that GLIC acted by improper or wrongful means[4]. Additionally, where the claim involves merely a contractual expectation (or an at-will contract), defendant's actions were also privileged.

Like interference with contract, Colorado law on this claim is shaped by Restatement (Second) of Torts, §767-771. Certain privileges, applicable here, have been set forth in these Restatements. These include the business competitor's privilege: a legitimate business activity intended to achieve an advantage over competitors, but which does not rely on improper methods, cannot provide a basis for liability—even if … a non-competitor is harmed as a result. *Campfield v. State Farm Mut. Auto. Ins. Co.*, 532 F.3d 1111, 1123 (10th Cir. 2008) (plaintiff glass repair shop failed to prove that insurer's policy of recommending against and undercompensating for windshield crack repairs over six inches in length was anything other than a legitimate business practice intended to achieve advantage over competitors). Here, GLIC was acting to preserve its

[4] See Footnote 2.

shareholders' interests in remaining agricultural water rights, as against others who may seek to deplete that resource. Where no improper means were employed, GLIC is just as lawfully entitled to take these actions as any business owner would be to engage in activities designed to gain advantage over competition.

The Restatement privileges to claims of tortious interference with prospective business also include Section 769 which provides: "[o]ne who, having a financial interest in the business of a third person intentionally causes that person not to enter into a prospective contractual relation with another, does not interfere improperly with the other's relation if he (a) does not employ wrongful means and (b) acts to protect his interest from being prejudiced by the relation." Plaintiff admits GLIC shareholders had an economic interest in the City's conversion of agricultural water to municipal water as it was affecting the supply of agricultural water remaining for GLIC's use. (*Complaint*, ¶¶ 12, 23, 24 **Exhibit B**; *Parker depo.* p. 88:17- 89:13, **Exhibit H**). GLIC acted to protect its interests, with these efforts culminating in the Settlement Agreement. No wrongful means were employed by GLIC in these efforts. GLIC actions occurred through legal channels involving no fraud or deceit.

Section 771 of the Restatement (Second) of Torts also provides the following privilege: "one who intentionally causes a third person not to enter into a prospective contractual relation with another in order to influence the other's policy in the conduct of his business does not interfere improperly with the other's relation if (a) the actor has an economic interest in the matter with reference to which he wishes to influence the policy of the other and (b) the desired policy does not unlawfully restrain trade or

otherwise violate an established public policy, and (c) the means employed are not wrongful." Section 771's privilege, the privilege to influence another's business policy, is also applicable here. At worst, GLIC influenced policy affecting conversion of certain agricultural water shares to municipal water rights, a practice that was adversely affecting the rights and interests of GLIC shareholders. GLIC's Settlement Agreement with the City, directed to ameliorating this harm to GLIC's shareholders, is not an unlawful restraint on trade and does not otherwise violate an established public policy.

Similarly, in *PPM America, Inc. v. Marriott Corp.*, 853 F.S upp. 860, 879 (D. Md. 1994), a Maryland Court applied the privilege where investors in hotel corporation threatened to stop doing business with corporation's financial advisors if the advisors backed a restructuring that would adversely impact the investors' interests in the corporation bonds. The restructuring deal fell through and the corporation sued the investors for tortious interference. The court granted summary judgment for the investors because their actions were not done for an unlawful purpose, nor were they done without right or justifiable cause. The investors were acting to protect their own economic interests by influencing those involved with the restructuring.

In sum, GLIC's conduct in negotiating and entering into the Settlement Agreement was privileged, pursuant to the Restatement sections discussed above. In the absence of proof of action by wrongful means[5], a claim for intentional interference with prospective business advantage cannot be maintained against GLIC. Here, Plaintiff

[5] In *Robinson*, *supra*, the Colorado Court of Appeals outlined examples of 'wrongful means' including another intentional tort such as fraud, conversion, and threats of violence. 209 P.3d at 1199.

has not even made any allegations of wrongful means. (*See generally, Complaint,* **Exhibit B**). The concept for no future Chubbuck conversions was proposed by Loveland, not GLIC, in the context of settlement negotiations. (*Facts, #9*) It is factually impossible for Plaintiff to prove this element of its claim. Summary judgment in GLIC's favor is therefore appropriate.

B. Declaratory Relief Claim

The Plaintiff has also made a declaratory relief claim asking the Court to declare the Settlement Agreement unenforceable as an impermissible delegation of its legislative authority. After the January 2010 Settlement Agreement, Loveland amended its ordinances to comply with the provisions. (**Exhibit E.3**; *Ordinance No. 5856*, **Exhibit J**) At a minimum, the City agents signing the Settlement Agreement had apparent authority to enter into the contract. GLIC is therefore entitled to have the Settlement Agreement remain in force. *See, e.g., Rush Creek Solutions, Inc. v. Ute Mountain Ute Tribe*, 107 P.3d 402 (Colo. App. 2004).

CONCLUSION

Under the undisputed facts of this case, Plaintiff cannot meet any of the elements of its claims for intentional interference with contract, or intentional interference with prospective business advantage claims. 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 28th day of August, 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 28th day of August, 2017, a true and correct copy of the foregoing **DEFENDANT GREELEY AND LOVELAND IRRIGATION COMPANY'S MOTION FOR SUMMARY JUDGMENT** was served electronically addressed to the following:

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