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DISTRICT COURT, LARIMER COUNTY, COLORADO 201 LaPorte Avenue, Suite 100 Fort Collins, CO 80521 Telephone: (970) 494-3500	
Plaintiff: LOVELAND EISENHOWER INVESTMENTS, LLC, a California limited liability company, v. **Defendants:** THE CITY OF LOVELAND, THE GREELEY AND LOVELAND IRRIGATION COMPANY, a Colorado non-profit corporation and JOHN DOES 1 through 50.	▲ **COURT USE ONLY** ▲ Case No.: 2016 CV 30362 Courtroom: 4C
Darrell G. Waas, #10003 Kathryn I. Hopping, #35036 WAAS CAMPBELL RIVERA JOHNSON & VELASQUEZ LLP 1350 17th Street, Suite 450 Denver, CO 80202 Telephone: 720-351-4700 Facsimile: 720-351-4745 waas@wcrlegal.com hopping@wcrlegal.com	

PLAINTIFF'S RESPONSE TO DEFENDANT GREELEY AND LOVELAND IRRIGATION COMPANY'S MOTION FOR SUMMARY JUDGMENT

Plaintiff Loveland Eisenhower Investments, LLC, ("LEI") through its undersigned counsel, submits the following Response to Defendant Greeley and Loveland Irrigation Company's (the "Company") Motion for Summary Judgment ("Motion"):

I. INTRODUCTION

The Motion argues GLIC is entitled to summary judgment on LEI's claims for tortious interference because all elements of those claims cannot be established. GLIC's arguments

misstate Colorado law and undisputed facts exist precluding summary judgment. Consequently, the Motion should be denied.

II. MATERIAL UNDISPUTED FACTS

LEI has set forth its Material Undisputed Facts in its Motion for Partial Summary Judgment ("LEI MSJ"). The LEI MSJ is hereby fully incorporated and will not be restated in total. LEI's additional responses to GLIC's enumerated Undisputed Facts ("UF") are below:

It is undisputed GLIC and the City of Loveland ("Loveland") entered into an agreement in 1977 that allowed Loveland to convert Chubbuck Inches for municipal use. Motion at UF 5. For the next twenty years, Loveland acquired Chubbuck Inches from developers holding those water rights and, in exchange, provided municipal credits to satisfy the developers' water rights requirements for their projects. *Id*. Loveland would then bank the newly acquired Chubbuck Inches and hold them until it had acquired enough Inches to justify the lengthy and expensive process to convert those Inches to municipal use in Water Court. *See Id.* at UF 6.

Over the next two decades, Loveland acquired and converted a cumulative total of 1411.58 Chubbuck Inches, or 88.8% of the total Chubbuck Inches in existence. *See* C.R.C.P. 30(b)(6) Deposition of Loveland ("Loveland Depo.") (Dewey)[1] at 46:4-47:6; 91:13-94:4, relevant portions of which are attached as **Exhibit A**. During this time, Loveland instituted four separate change cases in Water Court to convert the Chubbuck Inches from irrigation to municipal use. *See* C.R.C.P. Deposition of GLIC ("GLIC Depo.") at 116:15-117:5, relevant portions of which are attached as **Exhibit B**. GLIC did not object to these change cases. *See id.*

[1] Two different Loveland representatives provided testimony during the C.R.C.P. 30(b)(6) deposition of Loveland – Greg Dewey and Karl Barton. Both portions are collectively attached as **Exhibit A**; however, each citation identifies the representative providing the testimony.

In 2002, GLIC lodged its first objection to Loveland's conversion of Chubbuck Inches in Water Court in Case Number 2002CW392 (the "2002 Water Case"). Motion at UF 7. Specifically, GLIC learned Loveland was not providing return flows on the Chubbuck Inches Loveland had acquired and converted, making this water unavailable for use by GLIC's shareholders. **Exhibit B**, GLIC Depo. at 112:7-24. Because there were less unused portions of the Chubbuck Inches available to them, the Non-Party Shareholders became increasingly upset with Loveland's decision to acquire more and more Chubbuck Inches and convert them to municipal use. Thus, GLIC objected to Loveland's most recent change case of Chubbuck Inches involving a separate Contract User. *Id*. at 113:2-117:5; *see also* **Exhibit A**, Loveland Depo. (Dewey) at 36:13-37:21; 74:16-21.

As set forth in the LEI MSJ, LEI purchased the LEI Land in three parcels from 2000 to 2007 with the intent of developing it as a unified project for mixed uses (the "Project"). At the time of purchase of the Second and Third Parcels, the First Parcel was already located within Loveland and was zoned PUD for high density residential development. The Second and Third Parcel located outside Loveland came with a total of 31.25 contractual inches of Chubbuck water rights. *See* LEI MSJ at 6-7; *see also* Affidavit of Greg Parker ("Parker Affidavit") at ¶¶1-6, 9-11, attached as **Exhibit C**. As early as 2003, in connection with LEI's acquisitions and knowing its intent to develop using its water rights, LEI representative Mike Long contacted Loveland to inquire regarding how water rights were calculated in exchange for municipal credits. *See* **Exhibit A**, Loveland Depo. (Dewey) at 29:1-30:7. At that time, Loveland specifically informed Mr. Long its water right requirements for development are calculated based upon the formula and requirements located in Title 19 of the Municipal Code. *Id*. Simply put, Loveland told LEI to rely upon its Code. *Id*. at 29:23-25.

As set forth in the LEI MSJ and LEI's Response to Loveland's Motion to Dismiss, or in the alternative, Motion for Summary Judgment and Request for Stay Pursuant to C.R.S. §24-10-108 ("LEI Response")[2], at the time LEI purchased the LEI Land, and continuing until 2016, Loveland's Municipal Code specifically identified Chubbuck Inches as water rights Loveland would accept in exchange for municipal credits. *See* LEI MSJ at 8-18; LEI Response at 5-10; *see also* Affidavit of Larry Owen ("Owen Affidavit"), attached as **Exhibit D,** at 13-21; **Exhibit D**, Owen Affidavit at Attachment 2, 2010 City Code at Sections 1904.018, 19.04.045, 19.04.080, 19.04.090. These provisions of the Code were amended to exclude Chubbuck Inches until 2016. *Compare* 2012 Code provisions *with* 2016 Code provisions attached as **Exhibit D** at Attachments 3 and 4 respectfully.

Beginning in 2003 and continuing through annexation of the Second and Third Parcels in April of 2010, LEI was engaged in extensive negotiations with Loveland about the Project. During this time, Loveland never informed LEI of GLIC's objection in the 2002 Water Case, nor did it mention conversion of Chubbuck Inches was in question. *See* **Exhibit C**, Parker Affidavit at 9-29; **Exhibit D**, Owen Affidavit at 3-11. During this time, Loveland was aware LEI had Chubbuck Inches it intended to dedicate to Loveland in exchange for municipal credits. *See* LEI MSJ at 3-13; LEI Response at 2-10.

Prior to annexation, from 2008 to the beginning of 2010, LEI was also engaged in extensive negotiations with GLIC, during which GLIC learned of LEI's plans for development. *See* Affidavit of Keirstin Beck ("Beck Affidavit") at 3, 13, attached as **Exhibit E**. Specifically, the First Parcel and the Second Parcel were partially separated by a privately owned 33 foot strip of

[2] LEI hereby incorporates the LEI Response as though completely set forth herein.

land upon which GLIC had a prescriptive easement. The 33 foot strip of land went through a quiet title action from 2008-2010, which ultimately transformed the prescriptive easement into a negotiated permanent easement between LEI and GLIC (the "Quiet Title Action"). *See* **Exhibit E**, Beck Affidavit at 4; **Exhibit B**, GLIC Depo. at 19:21-20:1; 91:5-16. Additionally, from 2008 through 2009, GLIC and LEI had ongoing discussions regarding a recreational trail easement, during which the parties extensively discussed LEI's commercial development plans for the LEI Land. *See* **Exhibit B**, GLIC Depo. at 21:5-22:2.

As part of those ongoing negotiations, which took approximately two years, LEI informed GLIC of its plans for commercial development and its need to convert its Chubbuck Inches from irrigation to municipal use. Company manager, Ronald Brinkman, knew LEI was developing its property for commercial purposes, knew portions of the LEI Land needed to be annexed into Loveland, knew portions of the LEI Land (the Second and Third Parcels formally owned by Mr. and Mr. Glick) contained Chubbuck Inches that transferred with the land, and understood LEI would be using its Chubbuck Inches in furtherance of the development. *See* Deposition of Ronald Brinkman ("Brinkman Depo.") at 16:22-17:16; 19:5-20:16, relevant portions of which are attached as **Exhibit F**. In 2009, LEI's engineer, Larry Owen, had a meeting with Mr. Brinkman at the Project in order to understand how Chubbuck Inches were delivered across its property. During this meeting, Mr. Brinkman and Mr. Owen specifically discussed LEI's Chubbuck Inches, including which head gate would be used to supply the Chubbuck water to the LEI Land. *Id*. at 23:4-28:5. Mr. Brinkman specifically asked Mr. Owen if LEI intended to use their Chubbuck Inches to irrigate the LEI Land after development – Mr. Owen replied they did not. *Id*. Later, in

October of 2009, LEI attended a Company Board meeting in which it specifically presented to the Board LEI's plans for development of the Project. **Exhibit B**, GLIC Depo. at 21:5-23:10.

As early as 2008, GLIC's attorney, Jeffrey Kahn, was aware LEI owned the Second and Third Parcels of land and intended to annex these portions of the LEI Land into Loveland. **Exhibit B**, GLIC Depo. at 37:18-38:1; 40:15-41:20; 147:24-148:1. In 2008, GLIC was provided a site plan for the proposed development in which it was "evident" LEI was developing the LEI Land as commercial property and water would be provided through conversion of the Chubbuck Inches. *Id*. at 42:19-44:19; 45:2-24; 102:1-103:13. GLIC was also aware LEI's Second and Third Parcels of Land had Chubbuck Inches because the Ditch Rider, who owns and manages the Chubbuck ditch and delivers water out of that ditch, was required to deliver that water to the property. *Id*. at 46:9-48:1; 59:13-60:7. In short, prior to 2010, GLIC was well aware that LEI possessed Chubbuck Inches, was aware of the commercial Project and LEI's need for annexation, was aware LEI would not be using its Inches for irrigation and was aware of LEI's desire to use its Inches for municipal purposes on the Project.

GLIC and Loveland entered into the Settlement Agreement (the "Settlement") in January of 2010, which was negotiated primarily throughout the latter part of 2009. *See* **Exhibit B**, GLIC Depo. at 156:16-21; Motion at UF 8; *see also* a copy of the Settlement attached as **Exhibit G**. Under the terms of the Settlement, Loveland was permitted to convert to municipal use the Chubbuck Inches at issue in the 2002 Water Case, but is prohibited from seeking future conversions of Chubbuck Inches. *See* **Exhibit G**, Settlement at ¶6; *see also* **Exhibit A**, City Depo (Dewey) at 146:3-11. Consequently, the parties agree Loveland *may* acquire additional Chubbuck Inches, but simply could not change them later in Water Court. *Id*.; **Exhibit B**, GLIC Depo. at

172:4-14. GLIC entered into the Agreement to retain the benefit of the remaining unconverted Chubbuck Inches, which could not now be changed and would now flow to its Non-Party Shareholders. **Exhibit B**, GLIC Depo. at 64:7-19; 172:4-21.

GLIC knew the Settlement would affect the ability of holders of Chubbuck Inches to use those water rights for development in Loveland, but did not make any effort to notify the owners of unchanged Chubbuck Inches that a dispute affecting their potential ability to convert Chubbuck Inches existed, nor did it inform them the Settlement had been executed. **Exhibit B**, GLIC Depo. at 175:24-176:7. LEI did not know a dispute affecting use of its Chubbuck Inches existed. *See* C.R.C.P. 30(b)(6) Deposition of LEI ("LEI Depo.") at 125:14-126:7, relevant portions of which are attached as **Exhibit H**; *see also* Deposition of Larry Owen ("Owen Depo.") at 84:2-7, relevant portions of which are attached as **Exhibit I**; *see also* LEI Response at 8-9.

Mere months after the Settlement was executed, the Annexation Agreement (the "Agreement") between LEI and Loveland annexing the Second and Third Parcels of LEI Land into Loveland was approved by City Ordinance. **Exhibit C**, Parker Affidavit at Attachment 1, Agreement. The Settlement and the Agreement were negotiated at the same time. **Exhibit C**, Parker Affidavit at 25-26; *see also* **Exhibit A**, Loveland Depo. (Barton) at 23:13-25:5; **Exhibit B**, GLIC Depo. at 156:16-21. Indeed, by the time the Settlement was executed, Loveland and LEI had been negotiating the Agreement for over a year and most, if not all its terms were finalized. *See* **Exhibit C**, Parker Affidavit at 25-26. The Agreement needed merely to be approved by Ordinance of Loveland Council, which occurred on April 20, 2010. A copy of Ordinance #5495 approving the Agreement ("Annexation Ordinance") is attached as **Exhibit J**.

When it entered into Agreement, LEI understood its Chubbuck Inches could be acquired and converted by Loveland for municipal use on the Project for two reasons. First, Loveland had historically accepted and processed each and every application for conversion of Chubbuck Inches up to that point and had, in fact, converted 88.8% of all Chubbuck Inches in existence. *See* **Exhibit A**, City Depo (Dewey) at 46:16-47:6; 92:3-94:4. Second, Title 19 of the Loveland Municipal Code in effect at the time of execution of the Agreement (the "2010 Code") specifically contemplated acquisition of Chubbuck Inches and identified Chubbuck Inches as a source of water rights Loveland would accept in exchange for municipal credits. *See* **Exhibit D**, Owen Affidavit at Attachment 2, 2010 Code at Section 19. LEI's arguments concerning the applicability of the 2010 City Code and provisions of the Agreement outlining LEI's vested rights and requiring Loveland to accept LEI's Chubbuck Inches are specifically addressed in the LEI MSJ and LEI Response, which are incorporated herein and will not be restated.

Because the 2010 City Code did not require dedication of water rights for a commercial development until building permit, LEI did not seek to bank its Chubbuck Inches for municipal credits until December 2014. **Exhibit D**, Owen Affidavit at Attachment 2, 2010 City Code, Section 19.04.020; *see* **Exhibit I**, Owen Depo at 80:17-81:10. At that time, Loveland informed Mr. Owen it would not accept the Chubbuck Inches. **Exhibit D**, Owen Affidavit at 23.

III. ARGUMENT

1. Standard of Review

Summary judgment is a drastic remedy that is appropriate only when the pleadings and supporting evidence show there are no genuine issues as to any material fact in dispute, and as a matter of law, the moving party is entitled to summary judgment. C.R.C.P. 56(c); *In re Tonko*,

154 P.3d 397, 402 (Colo. 2007). The Court's initial function in ruling on a motion for summary judgment is to determine whether any material facts are disputed. It is not to resolve those disputes or assess the credibility of the parties. *Crouse v. City of Colorado Springs*, 766 P.2d 655, 661 (Colo. 1988). When determining whether summary judgment is appropriate, the nonmoving party is entitled to the benefit of all favorable inferences reasonably drawn from the facts, and all doubts must be resolved against the moving party. *Brodeur v. American Home Assurance Co*., 169 P.3d 139, 146 (Colo. 2007).

2. <u>Tortious Interference Claims</u>

GLIC seeks summary judgment in its favor on LEI's Fifth and Sixth Claims for Relief for intentional interference with contractual relations and intentional interference with prospective business advantage. Motion at p.7. As set forth below, summary judgment should be denied.

A. Disputed issues of fact exist on LEI's claim for tortious interference with contractual relations.

GLIC argues summary judgment is appropriate on LEI's claims for tortious interference with contractual relations for three reasons: (1) LEI had not formally executed the Agreement at the time the Settlement was executed; (2) Loveland has not breached the Agreement; and (4) there has been no intentional interference or improper conduct by GLIC. Motion at 9-14. In making these arguments, GLIC misleadingly applies older case law that has more recently been expanded by Colorado courts. Additionally, GLIC's arguments misinterpret applicable law demonstrate disputed issues of fact.

1. GLIC's argument applies incorrect case law.

GLIC cites incorrect elements of a claim for intentional interference with performance of a contract, stating:

> '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.'

Motion at 7-8. In support of this statement, GLIC cites *Krystkowiak v. W.O. Brisben Cos., Inc.*, 90 P.3d 859, 871 (Colo. 2004) and, in a footnote attached to this reference, cites an unpublished order in *Int'l Academy of Business and Financial Mgmt., Ltd. v. Mentz*, 2013 WL 3771288 (D. Colo. 2013), stating "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." *See* Motion at 8, fn. 2. The "earlier case law" referenced in this footnote is presumably the 2012 Colorado Court of Appeals holding in *Slater Numismatics, LLC v. Driving Force, LLC*, 310 P.3d 185, 189-192 (Colo. App. 2012).

In *Slater*, the Colorado Court of Appeals provided an in depth analysis of the elements for intentional interference set forth in *Krystkowiak* and expressly found such a claim is not limited to cases where the interference results only in a breach of contract or impossibility of performance. *See Slater*, 310 P.3d at 189-192. As set forth below in Section III(2)(a)(2), *supra*, *Slater* expanded this tort to include interference with **performance**, not simply breach or impossibility, and identified the elements of such a claim. *Slater*, 310 P.3d at 193-94 (*citing* Restatement Section 766 & cmts. c, h, j, k, o, p). The opinion in *Slater* was rendered 8 years after *Krystkowiak*, is binding precedent in this case, and did not overrule *Krystkowiak*, but simply expanded it. By contrast, the order in *Int'l Academy,* an unpublished decision is not binding on this Court, contains only a

citation to *Krystkowiak* and contains no analysis of *Slater*. *See Int'l Academy*, 2013 WL 3771288 at *4. The court in *Int'l Academy* was simply not asked to consider the elements in *Slater*, and so did not. *Id*.

GLIC's attempt to assert the stringent, narrow reading of *Krystkowiak* without citation or reference to *Slater* appears intentionally misleading. In any event, as set forth below, the elements in *Krystkowiak* do not apply.

2. Governing Colorado law on intentional interference with contract performance.

Restatement (Second) of Torts §766 (1979) is titled "Intentional Interference with Performance of Contract by Third Persons" and provides:

> One who intentionally and improperly interferes with the performance of a contract (except a contract to marry) between another and a third person by inducing or otherwise causing the third person not to perform the contract, is subject to liability to the other for the pecuniary loss resulting to the other from the failure of the third person to perform the contract.

Id. Thus, Section 766 involves direct interference in a third party contract. *See id*. Restatement (Second) of Torts § 766A (1979) it titled "Intentional Interference with Another's Performance of His Own Contract" and provides:

> One who intentionally and improperly interferes with the performance of a contract (except a contract to marry) between another and a third person, by preventing the other from performing the contract or *causing his performance to be more expensive or burdensome,* is subject to liability to the other for the pecuniary loss resulting to him.

See id. (emphasis added); *see also Westfield Development Co. v. Rifle Inv. Associates*, 786 P.2d 1112, 1117 (Colo. 1990). Section 766A involves cases in which the conduct of the defendant

either prevented plaintiff from performing his own contract with a third party or made his performance more expensive or burdensome. *Id.*

While earlier cases refer to these torts as "intentionally inducing a breach of contract," Colorado now follows the majority rule, which holds the tort of intentional interference with contractual relations is not limited to cases requiring proof of impossibility of performance or breach of contract. *Slater Numismatics, LLC v. Driving Force, LLC,* 310 P.3d 185, 189-192 (Colo. App. 2012); *see also* 2 Harper et al., *Harper, James and Gray on Torts* §6.7 at 365 (3 ed., Aspen Publishers, 2009). The *Slater* court determined the court in *Krystkowiak* was only expressing two of the possible ways in which the tort of intentional interference with contractual relations could be proved and determined an action lies, more broadly, for intentional interference with the *performance* of a contract. *Id.* Thus, in 2012, the Court in *Slater* determined a defendant may be liable for the intentional interference with contractual relations expressed in Section 766 of the Restatement (Second) of Torts where:

> (1) The defendant causes a third party to fail in some significant aspect of performance which the third party owes to the plaintiff, such as depriving the third party in significant part of the means of performance; and
>
> (2) The defendant's conduct was wrongful; and
>
> (3) The defendant acted either for the primary purpose of interfering with the performance of the plaintiff's contract, or knowing that the interference was certain or substantially certain to occur as a result of the defendant's actions.

Slater, 310 P.3d at 193-94 (*citing* Restatement Section 766 & cmts. c, h, j, k, o, p). Colorado courts now agree with many other authorities and jurisdictions that "a defendant's conduct short of causing breach or total impossibility of performance can be actionable under the theory of

intentional interference with contractual relations." *Id*. at 194. This interpretation is consistent with the Colorado Jury Instructions, which states "[w]here there is evidence that the third party has *partially* performed" the phrase "not to perform" in the instruction should be changed to "not to perform *fully*." CJI 24:1, note 5 (emphasis added).

Interference must be both intentional and improper. Colorado Jury Instruction 24.2 defines "intentional conduct" and states:

> 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. It is not necessary that a person act or speak with malice or ill will, but the presence or absence of malice or ill will may be considered by you in determining if the conduct is intentional.

C.J.I. 24:2. In determining whether the interference is improper, Colorado courts must weigh the factors contained in Section 767 of the Restatement (Second) of Torts:

> In determining whether an actor's conduct in intentionally interfering with a contract or a prospective contractual relation of another is improper or not, consideration is given to the following factors:
>
> (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.

Id. *See also Slater*, 310 P.3d at 195; C.J.I. 24:3 at note 1.

3. The Agreement existed at the time of the breach caused by GLIC.

GLIC first argues LEI's tortious interference claim fails because the Agreement did not exist when the Settlement was executed January 10, 2010. Motion at 8. GLIC's argument focuses on the wrong timeframe - the Agreement need only to exist at the time of Loveland's breach – December of 2014.

The word "contract" connotes a promise creating a duty recognized by law. Restatement (Second) of Torts §766, cmt. f. In order to be liable for intentional interference with contract, the Restatement is clear that "[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). Here, the breach caused by GLIC is Loveland's refusal to abide by the terms of the Agreement to consistently apply the 2010 Code and accept and convert LEI's Chubbuck Inches for municipal credits. *See* LEI MSJ at 14-18; LEI Response at 14-19. This breach occurred in December of 2014 – over four years after the Agreement was approved by City Ordinance - when LEI's engineer, Mr. Owen, contacted Loveland to dedicate its Chubbuck Inches and was told he could not. **Exhibit D**, Owen Affidavit at 23. GLIC's actions in entering into the Settlement intentionally made the City's performance more expensive or burdensome thereby causing this breach. Consequently, summary judgment should be denied.

Next, GLIC argues LEI's claim for tortious interference with contract fails because the Agreement does not contain a provision "covering the express subject matter of conversion of agricultural water to municipal water." Motion at 9. However, the fact the Agreement does not

expressly refer to "Chubbuck Inches" is irrelevant. As set forth in the LEI MSJ and LEI Response, Loveland has breached the Agreement by failing to apply its 2010 City Code in a consistent, uniform, non-discriminatory manner and consistent with other developers when it refused to accept and convert LEI's Chubbuck Inches. This breach was caused by GLIC's intentional interference – GLIC knew of the annexation and LEI's need to dedicate its Chubbuck Inches for municipal credits as part of its Project. The very purpose of the Settlement was to prevent this transaction. Moreover, GLIC's argument is based solely upon its improper reliance on *Krystkowiak* and other outdated case law pre-dating *Slater*. *See* Motion at 9. Under *Slater*, the proper consideration is whether GLIC "cause[d] a third party to fail in some significant aspect of performance which the third party owe[d[to the plaintiff, such as depriving the third party in significant part of the means of performance." *Slater*, 310 P.3d at 193-94.

Because disputed issues of fact exist regarding this element, summary judgment should be denied.

4. The Agreement has been breached.

Next, GLIC argues LEI's claim for intentional interference fails because the Agreement has not been breached. Motion at 10. However, as set forth above, breach is not necessary to find intentional interference with contract – GLIC need only have interfered with performance of the Agreement. *See* Slater, 310 P.3d at 193-94. Moreover, as set forth in the LEI MSJ and LEI Response, the Agreement has been breached. *See* LEI MSJ; LEI Response. Finally, under Restatement (Second) of Torts §766A, because GLIC's interference caused LEI's performance to be more expensive or burdensome, GLIC is liable for this pecuniary loss. *See id*.; *see also*

Westfield, 786 P.2d at 1117. At a minimum, disputed issues of fact exist regarding this element, summary judgment should be denied.

5. GLIC's interference was both intentional and improper.

a. GLIC's actions were intentional.

GLIC argues "[n]o factual allegations have been made" by LEI demonstrating GLIC entered into the Settlement with the intent of interfering with the Agreement. Motion at 11. This is false.

As set forth above, GLIC's intentional interference has caused Loveland to breach the Agreement. *See* Section II, *supra*. GLIC knew LEI was developing a commercial project and annexing into Loveland, knew LEI would need municipal water for the Project, knew Loveland was acquiring and converting Chubbuck Inches for municipal use, knew LEI had Chubbuck Inches, assumed LEI was using its Chubbuck Inches for development, knew LEI was not using its Chubbuck Inches for irrigation and yet never informed LEI of its dispute with Loveland or that GLIC was actively trying to prevent further conversion of Chubbuck Inches to municipal use by Loveland. *See* Section II, *supra*.

GLIC knew, by entering into the Settlement, it was intentionally preventing conversion of Chubbuck Inches, thereby making LEI's performance of its contract (i.e. development) more expensive and burdensome. *See* Restatement (Second) of Torts §766A. Further, GLIC knew, for twenty years, Loveland had consistently and uniformly acquired Chubbuck Inches from developers and converted them for municipal use - indeed, GLIC's own undisputed facts acknowledge this was the very purpose of the 1977 agreement between Loveland and GLIC. *See* Motion at UF 4 and 5 ("As time passed, Loveland grew, and the need for municipal water

increased…In 1977, Loveland and [GLIC] reached an agreement that allowed Loveland to convert Chubbuck Inches for municipal use."). GLIC knew Loveland had a pattern and practice of uniformly and consistently acquiring Chubbuck Inches and converting them. The very purpose of the Settlement was to prevent this in the future. By entering into the Settlement, GLIC knew Loveland would be prevented from converting LEI's Chubbuck Inches and knew it was making development and satisfaction of water dedication requirements more expensive and burdensome for holders of unchanged Chubbuck Inches. Because disputed issues of fact exist regarding intent, summary judgment should be denied.

b. GLIC's actions were improper.

GLIC argues, even if it intentionally interfered with the performance of the Agreement, its conduct was not "improper" because it was "permissibly acting in the interests of its shareholders, and was not acting out of animus toward Plaintiff." Motion at 13-14. However, review of the facts of this case and the factors set forth in Restatement (Second) of Torts §767 reveals GLIC's conduct was improper.

In determining whether an actor's conduct is improper courts consider the nature of the actor's conduct, his motive, the interests of the other, the interest sought to be advanced by the actor's conduct, social interest, proximity in time between conduct and interference and the relationship between the parties. *See* Restatement (Second) of Torts §767. As noted by the Colorado Supreme Court, because "it is so clearly dependent upon context and circumstances, we have never attempted to rigidly define "improper" for all purposes of interference with contract,"

but has instead favorably referenced Section 767 of the Restatement. *Warne v. Hall*, 373 P.3d 588, 596 (Colo. 2016). Comments to the Restatement note:

> …it has been suggested that the real question is whether the actor's conduct was fair and reasonable under the circumstances. Recognized standards of business ethics and business customs and practices are pertinent, and consideration is given to concepts of fair play and whether the defendant's interference is not "sanctioned by the 'rules of the game.'"

Restatement (Second) of Torts §767, cmt. j.

Applying these factors to the facts of this case, a disputed issue of fact exists concerning whether GLIC's conduct was improper. In 2009, GLIC's counsel, 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. 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. Mere months later, 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**. This conduct directly contravenes "recognized standards of business ethics and business customs and practices… and concepts of fair play…." Restatement (Second) of Torts §767, cmt. j.

Moreover, it is undisputed Mr. Brinkman knew LEI had Chubbuck Inches and knew they needed these Inches converted for municipal use on the Project. Motion at UF16. GLIC's Settlement specifically sought to prevent this exact type of conversion. *See Trimble v. City and County of Denver*, 697 P.2d 716, 726 (Colo. 1985) (*superseded by statute on other grounds*)

(stating if the actor is motivated solely by a desire to interfere in the contractual relations between contracting parties, the conduct is improper).

Although the Motion asserts Mr. Brinkman assumed LEI had already banked its Chubbuck Inches (Motion at UF16), it is undisputed GLIC never asked LEI if it had in fact done so 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. Instead, 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*. If Mr. Brinkman truly believed LEI had previously banked its Chubbuck Inches for municipal credits when it purchased its land years earlier, he would not have asked if they would be used for irrigation. Disputed issues of fact exist on this issue and a jury could easily conclude, based on the facts presented, Mr. Brinkman was aware LEI had not previously banked its Chubbuck Inches in the Loveland Water Bank. Mr. Brinkman testified he knew if LEI had banked its Chubbuck Inches before 2010 and prior to the execution of the Settlement, it could have obtained its municipal credits under the existing City municipal code. **Exhibit F**, Brinkman Depo. at 46:2-6. This was the exact action GLIC was seeking to prevent.

GLIC's reliance upon *Warne v. Hall*, 373 P.3d 588 (Colo. 2016) is misplaced. *See* Motion at 13. In *Warne*, the court was simply reviewing the allegations of the complaint when assessing whether plaintiffs had alleged a cause of action for intentional interference. *See id*. at 589. The court found the plaintiff's allegations were insufficient to state a claim because a number of them were conclusory and therefore not entitled to an assumption they were true. *Id*. at 596. Thus, the

court concluded without factual allegations supporting these statements, plaintiff's complaint failed to state a claim for tortious interference. *Id*.

Here, LEI is not relying solely on the allegations of its complaint. The facts of this case demonstrate GLIC misrepresented the nature of its dispute with Loveland to LEI in 2009 when it agreed its dispute did not implicate return flow issues on LEI's Project. GLIC then intentionally and improperly withheld vital information from LEI that would have led LEI to bank and convert its Chubbuck Inches to municipal use prior to execution of the Settlement. As a result, and because disputed issues of fact exist, summary judgment should be denied.

B. Disputed Issues of Fact Exist on LEI's Claim for Intentional Interference with Prospective Business Advantage.

LEI has pled its claim for intentional interference with prospective business advantage. Restatement (Second) of Torts §766B (19797) involves interference by a defendant with a prospective business relation and states:

> One who intentionally and improperly interferes with another's contractual relation (except a contract to marry) is subject to liability to the other for the pecuniary harm resulting from loss of the benefits of the relation, whether the interference consists of:
>
> (a) Inducing or otherwise causing a third person not to enter into or continue the prospective relation; or
>
> (b) Preventing the other from acquiring or continuing the prospective relation.

Id.

GLIC argues it did not intentionally interfere with LEI's prospective business relationship because it had no knowledge LEI had not banked its Chubbuck Inches when they were first acquired and because, according to GLIC, it was Loveland that proposed no further conversion of

Chubbuck Inches for municipal use. Motion at 14-15. However, for the reasons stated in Section III(2)(A)(5) above, LEI's interference was intentional and improper or, minimally, disputed issues of fact exist.

Additionally, GLIC argues, even if its interference with LEI's prospective business relations was intentional and improper, certain privileges apply permitting its conduct. Motion at 15-18. However, these privileges do not apply to the facts of this case.

First, GLIC asserts the privilege found in Restatement (Second) of Torts §768 concerning a business competitor's privilege applies. Motion at 15. However, this restatement concerns situations where one is a competitor of another for the business of a third person:

> One's privilege to engage in business and to compete with others implies a privilege to induce third persons to do their business with him rather than with his competitors. In order not to hamper competition unduly, the rule stated in this Section entitles one not only to seek to divert business from his competitors generally but also from a particular competitor.

Restatement (Second) of Torts §768, cmt. b. Here, GLIC and LEI are not competitors competing for Loveland's business. The privilege cited in §768 is not applicable.

Next, GLIC argues the "financial interest privilege" identified in Restatement (Second) of Torts §769 applies to this case. It does not. Section 769 states:

> One who, having a financial interest **in the business of a third person** intentionally causes that person not to enter into a prospective contractual relations 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.

Id. (emphasis added). The comments to this Section clarify the "financial interest" required:

> The financial interest in another's business requisite for the rule stated in this Section is an interest in the nature of an investment. A part owner of the business, as for example, a partner or stockholder.. A bondholder or other creditor may also have it. On the other hand, the interest of a person who looks to a third person for business and will lose business opportunities if that person enters into the business relations involved is not a financial interest under the rule stated in this Section.

Id. at cmt. c. While GLIC's shareholders have a financial interest in the return flows of Chubbuck Inches, GLIC does not have an investment interest in Loveland. Consequently, the privilege outlined in Section 769 does not apply.

Finally, GLIC argues Section 771 of the Restatement (Second) of Torts also applies. Section 771 provides:

> 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.

Restatement (Second) of Torts §771. "The rule stated in this Section applies to protect the actor's interest in the business policy of the person harmed." *Id*. at cmt. c. "The purpose required under this Section is, then a purpose to alter the harmed parties' policy in the conduct of his business, such as his hours of business, his wage policy, his sales policy, his employment or credit policy and so forth." *Id*. "Thus, if A induces B not to sell to C in order to influence C not to cut his

prices…A's conduct is not improper." *Id.* Here, GLIC alleges its actions were an effort to influence the policy of ***Loveland***, not the harmed party (LEI) as required to qualify under the privilege contained in Section 771. Thus, Section 771 does not apply.

3. LEI's Declaratory Relief Claim is Proper

GLIC argues, because the City had apparent authority to enter into the Settlement, the Settlement should remain in full force. Motion at 18. However, as set forth in the LEI MSJ and LEI Response, LEI can receive a declaration from the Court enforcing the Agreement without breaching or affecting the Settlement – Loveland can simply be required to accept LEI's Chubbuck Inches as required by the 2010 Code and the Agreement and provide municipal credits. Loveland need not convert these in Water Court. For the reasons outlined in the LEI MSJ and LEI Response, LEI's declaratory relief claim is proper.

CONCLUSION

For the reasons stated above, the Motion should be denied.

Respectfully submitted this 21st day of September, 2017.

WAAS CAMPBELL RIVERA JOHNSON & VELASQUEZ LLP

By: */s/ Kathryn I. Hopping*
Darrell G. Waas
Kathryn I. Hopping
Attorneys for Plaintiff

CERTIFICATE OF SERVICE

I hereby certify that on this 21st day of September, 2017, a true and correct copy of **PLAINTIFF'S PARTIAL MOTION FOR SUMMARY JUDGMENT** was filed and/or served electronically via Colorado Courts E-Filing and/or sent via U.S. Mail, postage prepaid as follows:

Josh A. Marks
Mary Sue Greenleaf
Berg Hill Greenleaf Ruscitti LLP
1712 Pearl Street
Boulder, CO 80302

jam@bhgrlaw.com
msg@bhgrlaw.com

Attorneys for Defendant City of Loveland

Mark C. Overturf
Overturf McGath & Hull, P.C.
625 E. 16th Avenue, Suite 100
Denver, CO 80203

mco@omhlaw.com

Attorney for Defendant The Greeley and Loveland Irrigation Company

/s/ Lori B. Crosby
Lori B. Crosby

In accordance with C.R.C.P. 121 §1-26(9), a printed copy of this document with original signature(s) is maintained by Waas Campbell Rivera Johnson & Velasquez LLP, and will be made available for inspection by other parties or the Court upon request.