DISTRICT COURT CITY & COUNTY OF DENVER, COLORADO City and County Building, Rm. 230 1437 Bannock Street Denver, CO 80202	DATE FILED: September 1, 2023 1:58 PM FILING ID: 20B61372B1C9E CASE NUMBER: 2023CV32212
Plaintiff: EBERT METROPOLITAN DISTRICT, a Colorado Special District, v. Defendant: TOWN CENTER METROPOLITAN DISTRICT, a Colorado Special District.	
Attorneys for Defendant Town Center Metropolitan District Peter C. Forbes, #14081 Kamper & Forbes, LLC 730 Seventeenth Street — Suite 700 Denver, Colorado 80202 303 893-1815 (telephone) 303 893-1829 (facsimile) pforbes@csmkf.com	Case Number: 2023CV32212 Division: 280

MOTION TO DISMISS

Pursuant to C.R.Civ.P. 12(b)(1) and (5), defendant Town Center Metropolitan District ("Town Center"), through its undersigned counsel, hereby moves for dismissal of the claims asserted by plaintiff Ebert Metropolitan District ("Ebert"). Additionally, Town Center requests an award of its reasonable fees and costs pursuant to C.R.S. §13-17-101 *et seq.*[1]

OVERVIEW

Ebert alleges that Town Center has failed to perform its obligations under both a Master Declaration governing the development of a master planned community and a service agreement between the parties. Based on those allegations, it asks the Court to order Town

[1] The undersigned certifies pursuant to C.R.Civ.P. 121 §1-15(8) that he consulted with opposing counsel before filing this motion and that the relief requested herein is opposed.

Center to perform its obligations under those documents either through issuing a mandatory injunction, a decree of specific performance, or a writ of mandamus. [*See* Complaint, p. 1, ¶1.]

Controlling case law, in the form of *Wheat Ridge Urban Renewal Authority v. Cornerstone Group XXII, L.L.C.,* 176 P.3d 737 (Colo. 2007) and *Thompson Creek Townhomes, LLC v. Tabernash Meadows Water and Sanitation District,* 240 P.3d 554 (Colo.App. 2010), establishes that this Court lacks the power to order a political subdivision to specifically perform a contract. Those decisions, along with *Snyder v. Sullivan,* 705 P.2d 510 (Colo. 1985) establish that this Court also may not enter a mandatory injunction requiring such performance. Finally, with respect to Ebert's request for issuance of a writ of mandamus, such writs were abolished decades ago when C.R.Civ.P. 106 was adopted, meaning that on its face this claim asks for relief this Court lacks the authority to grant. Alternately, this claim is read as seeking relief in the nature of mandamus under Rule 106(a)(2), it must be dismissed because (a) such relief does not lie to enforce the terms of a contract and (b) Ebert does seek to compel performance of discrete non-discretionary ministerial acts.

Accordingly, Ebert's claims must be dismissed pursuant to C.R.Civ.P. 12(b)(1), because this Court does not have the power to grant the relief being requested, or pursuant to C.R.Civ.P. 12(b)(5) because Ebert has failed to state claims upon which this Court may grant relief. Additionally, for the reasons set forth below, Ebert's pursuit of its claims is substantially frivolous and substantially vexatious within the meaning of C.R.S. §13-17-101 *et seq.,* mandating an award to Town Center of its reasonable attorney's fees and costs.

RELEVANT FACTS[2]

Town Center and Ebert are duly created special districts and, as such, are political subdivisions of the State of Colorado. [Complaint, p. 2, ¶¶2-3 and 9.] They were formed in connection with the development of a master planned community known as Green Valley Ranch North. Development of that community was subject to the terms and conditions of a Master Declaration. [*See* Complaint, pp. 2-3, ¶¶7-14.] Additionally, Town Center and Ebert entered into a service agreement that was amended on several occasions and which, as amended, is still in effect (the "Service Agreement"). [*See* Complaint, pp. 4-5, ¶¶25-27.]

Under the first Section 5.5 of the Service Agreement, Town Center "for itself and on behalf of Ebert" was vested with

> the authority, duty and power to enforce the Master Declaration of Covenants, Conditions and Restrictions for Green Valley Ranch North (the Covenants"), including without limitation the implementation and enforcement of covenants and rules and procedures for the notice of alleged violations, conduct of hearings and imposition of associated fees, as well as the establishment and administration of the design review guidelines, and establishment of regulations and rules for the design and other review procedures prescribed by the Covenants.

[*See* Complaint, Exhibit C, p. 14.][3]

Additionally, although development within Green Valley Ranch North was subject to the covenants set forth in the Master Declaration, the Master Declaration expressly gave Town Center the discretion to determine whether those covenants should be strictly enforced. It also gave Town Center the authority to grant variances from the application of those covenants. Thus,

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[2] For purposes of this motion Town Center assumes the truth of Ebert's factual allegations, but not its legal conclusions. It does so even though such an assumption is not required in ruling on a motion to dismiss for lack of subject matter jurisdiction. *See Rocky Mountain Gun Owners v. Polis,* 2021 COA 137, ¶6, 508 P.3d 316, 318 (Colo.App. 2021).

[3] The Service Agreement contains two Section 5.5s. Only the first of those sections, the relevant portion of which is quoted above, is applicable here.

Section 4.1(a) of the Master Declaration provides in relevant part that

> The strict application of the covenants, limitations, and restrictions set forth in this Article 4 and in this Master Declaration in any specific case may be modified or waived in whole or in part by the Town Center District if such strict application would be unreasonably or unduly harsh under the circumstances and such modification or waiver is in writing or is contained in Electronically Transmitted or written guidelines or rules promulgated by the Town Center District.

and Section 6.16 of the Master Declaration provides in relevant part that

> The Town Center District may authorize variances from compliance with any of the provisions of this Master Declaration, including restrictions upon height, size, floor area, or placement of structures or similar restrictions, when circumstances such as topography, natural obstructions, hardship, or aesthetic or environmental consideration may require.

[*See* Complaint, Exhibit A, pp. 19 and 38.][4]

Ebert contends that Town Center has breached its obligation to enforce the Master Declaration in three different ways. First, Ebert contends that by failing to require various lot owners to remove gates they installed in community fencing, and to then require those lot owners to restore that fencing to its original condition, Town Center is breaching its obligation to ensure that community fencing is maintained in its original condition. Second, Ebert contends that Town Center has failed to maintain certain portions of the community fencing in good repair, in violation of its obligation to do so. Third, Ebert contends that Town Center has failed to maintain certain public landscaping in violation of its obligation to maintain such landscaping in a "clean, safe, attractive, and sightly condition, and in good repair." [*See* Complaint, pp. 5-7, ¶¶30-37.]

[4] Although Ebert does not cite these provisions, because the Master Declaration and Service Agreement are referenced in the Complaint, the Court may properly consider these provisions in determining whether it has subject matter jurisdiction and whether Ebert has stated claims upon which relief may be granted. *See Campaign Integrity Watchdog, LLC v. Alliance for a Safe and Independent Woodmen Hills,* 2017 COA 22, ¶28, 454 P.2d 251, 258 (Colo.App. 2017) (in ruling on a motion to dismiss, when documents are referenced in a complaint, "a court may consider those documents in addition to the allegations stated in the complaint").

Ebert then asserts three claims for relief. The first asks the Court to enter a mandatory injunction requiring Town Center to enforce the terms of the Master Declaration it has allegedly failed to enforce. [*See* Complaint, pp. 7-8, ¶¶42-50.] The second asks the Court to order Town Center to specifically perform its obligation under the Service Agreement to enforce the covenants contained in the Master Declaration, along with injunctive relief prohibiting Town Center from failing to perform that obligation and transferring any property until it performs that obligation. [*See* Complaint, pp. 8-9, ¶¶51-56.] The third asks the Court to issue a writ of mandamus compelling Town Center to perform its obligation under Section 5.5 of the Service Agreement to enforce the terms of the Master Declaration. [*See* Complaint, pp. 9-10, ¶¶57-60.]

ARGUMENT

A. Controlling Case Law Establishes That This Court May Not Issue A Decree Of Specific Performance To Enforce A Governmental Contract.

As noted above, Ebert's Second Claim For Relief asks this Court to order Town Center to specifically perform its obligation under the Service Agreement to enforce the covenants contained in the Master Declaration and, in connection therewith, to issue an injunction prohibiting Town Center from failing to perform that obligation and transferring any property until it fulfills that obligation. As a matter of law, this Court does not have the authority to grant such relief.

In *Wheat Ridge Urban Renewal Authority v. Cornerstone Group XXII, L.L.C.,* 176 P.3d 737 (Colo. 2007), the Colorado Supreme Court addressed for the first time the question of whether Colorado courts could compel political subdivisions to perform governmental contracts. In particular, *Wheat Ridge* involved an attempt by a developer to have the court issue an order requiring the Wheat Ridge Urban Renewal Authority to specifically perform a contract in which it

had contractually agreed to condemn certain property. In addressing that issue, the Colorado Supreme Court ruled that under separation of powers principles Colorado courts do not have the authority to order political subdivisions of the State of Colorado to specifically perform contracts in which the political subdivision had agreed to exercise their "core governmental powers" — in that case, the power to condemn private property. *See id.* at 744-76.

Thompson Creek Townhomes, LLC v. Tabernash Meadows Water and Sanitation District, 240 P.3d 554 (Colo.App. 2010), then addressed the question of whether the separation of powers principles underlying the decision in *Wheat Ridge* were limited to the exercise of core governmental powers, or whether those principles reached more broadly. Specifically, *Thompson Creek Townhomes* involved an attempt by a developer to have a court order a special district to specifically perform a contract to reserve certain water taps for a proposed real estate development. In addressing that issue, the Court of Appeals held that the rule announced in *Wheat Ridge* was not limited to core governmental powers but, instead, applied to any attempt to have a court order specific performance of a governmental agreement. On that basis, *Thompson Creek Townhomes* held that separation of powers principles prevented the court from ordering the defendant special district to specifically perform the contract at issue even though that contract did not involve the exercise of a core governmental power. *See id.* at 555-57.

As the only published Court of Appeals decision addressing this question, *Thompson Creek Townhomes* sets forth the controlling rule of law with respect to Ebert's claim for specific performance. *See* C.A.R. 35(e) ("Opinions [of the Court of Appeals] designated for official publication must be followed as precedent by all lower court judges in the state of Colorado."). Thus, because *Thompson Creek Townhomes* holds that this Court does not have the authority to issue a decree of specific performance against Town Center, Ebert's Second Claim

For Relief, which seeks precisely such relief, must be dismissed for lack of subject matter jurisdiction — or, given that this claim seeks relief beyond that this Court is authorized to grant, for failure to state a claim upon which relief may be granted.[5]

B. Ebert's Claim For A Mandatory Injunction Is Also Subject To Dismissal Under Colorado Law, Including *Wheat Ridge* and *Thompson Creek Townhomes.*

Ebert's First Claim For Relief seeks entry of a mandatory injunction requiring Town Center to enforce the covenants contained in the Master Declaration. [*See* Complaint, p. 7.] Nothing in the Master Declaration gives Ebert the right to bring an action against Town Center to enforce the covenants set forth therein. Instead, the only basis upon which Ebert may seek to compel Town Center to perform its obligation to enforce the Master Declaration is the first Section 5.5 in the Service Agreement. Thus, the substance of this claim is a request for entry of a permanent injunction requiring Town Center to perform a contractual obligation.

There is not a single reported Colorado decision holding that Colorado courts have the authority to enter injunctions compelling political subdivisions to perform their contractual

[5] The fact that Ebert asks for an injunction restraining Town Center from failing to perform its obligation under the Service Agreement to enforce the Master Declaration, and to prohibit Town Center from transferring any property until it fulfills that obligation, does not change this conclusion. The effect of such an injunction would be to require Town Center to perform its alleged contractual obligation to enforce the covenants set forth in the Master Declaration, which is precisely the type of relief *Thompson Creek Townhomes* holds that separation of powers principles prohibit this Court from granting. It is hornbook law that courts are required to look to substance rather than form, and that accordingly "the law may not be used to permit one to accomplish indirectly what he may not achieve directly." *See Salle v. Howe,* 793 P.2d 628, 631 (Colo.App. 1990); *accord State Board of Dental Examiners v. Miller,* 8 P.2d 699, 702 (Colo. 1932). Thus, Ebert may not avoid the reach of *Thompson Creek Townhomes* by recharacterizing its request for an order requiring Town Center to specifically perform its obligation to enforce the Master Declaration as a request for an injunction prohibiting Town Center from failing to enforce that obligation and transferring any property until that obligation is fulfilled.

obligations. The lack of such authority is not surprising, not only because specific performance is the recognized equitable remedy for compelling performance of a party's contractual obligations, but also because there is a fundamental difference between ordering specific performance of a contract and entering mandatory injunctive relief.

More particularly, specific performance is an equitable remedy that enables a court to order a party to perform its contractual obligation in order to fulfill the "legitimate expectations of the wronged promise." Conversely, "unlike specific performance, a mandatory injunction prescribes conduct that has not been defined by contract." *See Snyder v. Sullivan,* 705 P.2d 510, 513 & n. 5 (Colo. 1985). Thus, as a threshold matter, there is no legal authority supporting Ebert's claim for issuance of a mandatory injunction requiring Town Center to perform its alleged contractual obligations.

Further, even if mandatory injunctive relief did lie to compel performance of contractual obligations, there is no substantive difference between ordering a governmental entity specifically to perform a contract and entering a mandatory injunction compelling a governmental entity to perform a contract. Indeed, Ebert itself admits that its claim for a mandatory injunction "resembles specific performance in its requirement of affirmative performance." [*See* Complaint, p. 8, ¶44.] Consequently, to find that courts can issue mandatory injunctions to compel a governmental entity to perform a contract — which is the very relief *Wheat Ridge* and *Thompson Creek Townhomes* hold that courts cannot order in the form of a decree of specific performance — would be contrary to the separation of powers principles underlying those decisions.

Or, stated differently, the legal principle underlying the decisions in *Wheat Ridge* and *Thompson Creek Townhomes* is that fundamental separation of powers principles dictate the conclusion that, at least without express legislative authorization, courts may not interfere with

governmental decision-making by compelling performance of governmental contracts through the use of equitable remedies. *See Wheat Ridge,* 176 P.3d at 745 (quoting *Larson v. Domestic & Foreign Commerce Corp.,* 337 U.S. 682, 704 (1949)): *accord Thompson Creek Townhomes,* 240 P.3d at 556. That rationale applies with equal force to the use of the equitable remedies of specific performance and mandatory injunctive relief. Hence, the legal principle underlying *Wheat Ridge* and *Thompson Creek Townhomes* applies with equal force to Ebert's request for issuance of a mandatory injunction requiring Town Center to perform its obligation under the Service Agreement to enforce the covenants contained in the Master Declaration. Thus, Ebert's First Claim For Relief must also be dismissed under either under C.R.Civ.P. 12(b)(1) or C.R.Civ.P. 12(b)(5).[6]

C. Ebert Has Failed To State A Claim Upon Which Relief In The Nature Of Mandamus May Be Granted.

Ebert's Third Claim For Relief seeks issuance of a writ of mandamus. [*See* Complaint, p. 9, ¶58.] Under C.R.Civ.P. 106(a), however, the availability of Colorado district courts to issue writs of mandamus in Colorado district courts was abolished many decades ago.

[6] Town Center notes that, at various places in its Complaint, Ebert cites Section 6.2 of the Service Agreement in support of its claims. That section of the Service Agreement states that Ebert may seek injunctive relief, specific performance, and a writ of mandamus to enforce a breach of the Services Agreement. [*See* Complaint, pp. 8-9, ¶¶51 and 57.] Parties may not, however, contractually vest a court with authority it would not otherwise have. *See Colorado Comp. Ins. Auth. v. Jorgensen,* 992 P.2d 1156, 1161 (Colo. 2000); *see also Clinger v. Hartshorn,* 911 P.2d 709, 710 (Colo.App. 1996) (contract parties "cannot, by including certain language in their agreement, create a right to injunctive relief where it would otherwise not be appropriate") (internal citations omitted). Thus, the fact that Section 6.2 of the Service Agreement references possible remedies to enforce the obligations set forth therein has no bearing on the questions raised by this motion, which are whether this Court has the authority to order specific performance of a governmental contract, to grant a mandatory injunction requiring performance of a governmental contract, or to issue a writ of mandamus requiring performance of a governmental contract.

For that reason alone, this claim must be dismissed.

Moreover, even if one assumes that what Ebert is really requesting is relief in the nature of mandamus under Rule 106(a)(2), such relief can only be obtained if the requirements set forth in that rule, as interpreted by Colorado's courts, have been satisfied. *See generally Hall v. City and County of Denver,* 190 P.2d 122, 125 (Colo. 1948). Under the plain language of Rule 106(a)(2), relief in the nature of mandamus is only available to compel an act the law "specifically enjoins as a duty resulting from an office, trust, or statute." Or, in Ebert's own words, "A writ of mandamus is appropriate to compel a governmental body to perform an official act specifically required by law." [*See* Complaint, p. 9, ¶58.]

Ebert's Third Claim For Relief does not ask the Court to enforce a duty imposed on an official by virtue of the office held, a trust, or a statute. Instead, it asks the Court to enter an order compelling Town Center to perform a contract — which by definition involves duties voluntarily assumed by Town Center, not duties "resulting from an office, trust, or statute." *See Mid Valley Real Estate Solutions V, LLC v. Hepworth-Pawlek Geotechnical, Inc.,* 2013 COA 119, ¶7, 343 P.3d 987, 989 (Colo.App. 2013) (unlike tort duties, "contractual duties arise solely from voluntary promises between the parties"); *see also Osband v. United Airlines,* 981 P.2d 6161, 620 (Colo.App. 1998) (contract terms involve a "voluntary, self-imposed undertaking"). Thus, Ebert's Third Claim For Relief must be dismissed because, in asking this Court to order Town Center to perform under a contract, it seeks relief that is not available under Rule 106(a)(2).

Further, relief in the nature of mandamus is only available when the movant seeks to "compel performance of purely ministerial duties involving no discretionary rights and no exercise of judgment." *See, e.g., Gandy v. Williams,* 2019 COA 118, ¶24, 461 P.3d 575, 583 (Colo.App. 2019). Accordingly, relief in the nature of mandamus will not lie to "enforce duties

generally, or to control and regulate a general course of official conduct for a long series of acts to be performed under varying conditions," particularly where discretionary decisions will be required in connection with implementing such a course of conduct. *See Rocky Mountain Animal Defense v. Colorado Division of Wildlife,* 100 P.3d 508, 517 (Colo.App. 2004); *accord Ahern v. Baker,* 166 P.2d 366, 369 (Colo. 1961).

Here, the relief sought by Ebert is precisely the type of relief that *Rocky Mountain Animal Defense* and *Ahern* hold is not available under Rule 106(a)(2). For example, Ebert seeks an order compelling Town Center to eliminate the gates placed in the community fencing in alleged violation of the Master Declaration. But, as noted above, under Section 4.2 of the Master Declaration, Town Center has the discretion not to strictly enforce the covenants in the Master Declaration and to grant variances therefrom — discretion which Ebert's own exhibits establish that Town Center has in fact exercised by determining that such gates may be maintained. [*See* Complaint, p. 6, ¶33 and Exhibit G.] Thus, the relief that Ebert is seeking implicates discretionary decision-making on the part of Town Center, which is precisely the type of relief that is not available under Rule 106(a)(2).

Additionally, Ebert's request that Town Center be ordered to maintain community fencing and landscaping does not seek an order compelling performance of specific nondiscretionary acts. For example, Ebert's Complaint states that it is only identifying *examples* of Town Center's alleged failure to maintain the fencing and landscaping in accordance with the Master Declaration, and then seeks an order *generally* requiring Town Center to comply with its obligations to maintain community fencing and landscaping. [*Compare* Complaint, p. 6, ¶34 *with* Complaint, p. 11, ¶4(a) and (b).] Therefore, on its face, the relief sought by Ebert is not limited to compelling the performance of specific ministerial acts. Instead, Ebert asks the Court to compel

Town Center to engage in a general course of conduct that would necessarily involve taking actions that will vary in different conditions (*e.g.,* depending on the state of fencing and landscaping at different locations), and that would also involve the exercise of discretion in, for example, determining when maintenance is appropriate or what actions are appropriately taken with respect to different landscaped areas. Thus, for this reason as well, the relief sought by Ebert is precisely the type of relief that may not be granted in connection with a claim for relief in the nature of mandamus. *See Rocky Mountain Animal Defense* and *Ahern, supra, see also Smith v. Plati,* 258 F.3d 1167, 1179 (10th Cir. 2001) (under Colorado law, relief in the nature of mandamus was not proper where requested order would require court to "be constantly looking over [the defendant's] shoulder" to determine whether the defendant complied with its obligations).

D. Ebert's Pursuit Of Its Claims Is Both Substantially Frivolous And Substantially Vexatious Within The Meaning Of C.R.S. §13-17-101 *et seq.,* Mandating An Award Of Reasonable Fees And Costs In Favor Of Town Center.

C.R.S. §13-17-102(2) provides that a court "shall" award attorney's fees against any attorney or party who has brought a civil action "either in whole or in part" that lacks substantial justification. C.R.S. §13-17-102(4) provides that the term "lacked substantial justification" means that the claim in question was "substantially frivolous, groundless, or vexatious." For purposes of determining when an award of fees is mandated, a claim is "substantially frivolous" when it cannot be supported by any rational legal argument. *See, e.g., Western United Realty, inc. v. Issacs,* 679 P.3d 1063, 1069 (Colo. 1984). And a claim is "substantially vexatious" when it is asserted in bad faith, which includes conduct that is stubbornly litigious. *See, e.g., In re Marriage of Roddy and Betherum,* 338 P.3d 1070, 1077 (Colo.App. 2014).

1. Ebert's Pursuit Of Its Specific Performance Claim Is Both Substantially Frivolous and Substantially Groundless.

Ebert's Second Claim For Relief seeks a decree of specific performance against a governmental entity. As discussed above, *Thompson Creek Townhomes* is directly on point and unambiguously holds Colorado courts do not have the authority to order a governmental entity to specifically perform a contract. Hence, as a matter of law, Ebert's assertion of its Second Claim For Relief is substantially frivolous within the meaning of C.R.S. §§13-17-102(2) and (4). *See Issacs, supra; see also Foxley v. Foxley,* 939 P.2d 455, 460 (Colo.App. 1996) (claim seeking relief that could not be awarded as a matter of law (in that case damages) was necessarily frivolous).

Moreover, counsel for Town Center twice advised counsel for Ebert of the holding in *Thompson Creek Townhomes* and, the second time it did so, specifically requested that Ebert withdraw its specific performance claim on the ground that pursuit of that claim was substantially frivolous given the holding in *Thompson Creek Townhomes.* [*See* attached Exhibits A and B.] Nonetheless, Ebert did not withdraw that claim. Hence, because Ebert continued to pursue its Second Claim For Relief with actual knowledge of controlling precedent establishing that Colorado courts do not have the authority to grant the relief being sought pursuant to that claim, its pursuit of that claim was stubbornly litigious and, hence substantially vexatious within the meaning of C.R.S. §13-17-102(4).

2. Ebert's Pursuit Of Its Mandamus Claim Is Also Substantially Frivolous And Substantially Vexatious.

Ebert's Third Claim For Relief asks the Court to issue a writ of mandamus. It does so even though the availability of such writs in Colorado district courts was expressly abolished by the plain language of Rule 106(a). Asking for relief that cannot be granted as a matter of law

is, by definition, substantially frivolous. *See Foxley, supra.*

Moreover, even if Ebert's Third Claim For Relief is construed, not as a request for writ of mandamus (even though that is the actual form of relief that Ebert requested), but instead as a request for relief in the nature of mandamus under Rule 106(a)(2), the pursuit of such a claim would nonetheless still be substantially frivolous. That is so because, per the express language of Rule 106(a)(2), such relief is only available to enforce an official duty, *i.e.,* a duty stemming from an "office, trust, or station." Thus, in seeking to compel performance under a contract, which by definition does not involve the performance of a duty that stems from an "office, trust, or station," Ebert is again seeking relief that is not available as a matter of law. Hence, even if Ebert's Third Claim For Relief is construed as a request for relief in the nature of mandamus, because the relief Ebert seeks through that claim is unavailable as a matter of law Ebert's pursuit of that claim is, by definition, substantially frivolous. *See Foxley, supra.*

Further, controlling case law unequivocally holds that relief in the nature of mandamus cannot be awarded to "enforce duties generally, or to control and regulate a general course of official conduct for a long series of acts to be performed under varying conditions." *See Gandy* and *Ahern, supra.* That, however, is precisely the type of relief that Ebert is seeking. Accordingly, for this separate and distinct reason, Ebert's Third Claim For Relief again seeks relief that unavailable as a matter of law. Thus, for this reason as well, Ebert's assertion of its Third Claim For Relief is necessarily frivolous. *See Foxley, supra.*

Finally, counsel for Town Center also advised counsel for Ebert of the controlling case law establishing that, as a matter of law, Ebert's assertion of its Third Claim For Relief, whether styled as a request for the issuance of a writ of mandamus or a request for relief in the nature of mandamus, was improper under controlling case law. [*See* Exhibit B, *supra.*]

Nonetheless, Ebert continued to pursue that claim. Thus, Ebert's continued assertion of its Third Claim For Relief also constitutes conduct that is stubbornly litigious, and accordingly also constitutes conduct that is substantially vexatious within the meaning of C.R.S. §§13-17-102(2) and (4).

3. Town Center Should Also Be Awarded Attorney's Fees With Respect To Ebert's First Claim For Relief.

There is no Colorado authority supporting the proposition that a mandatory injunction will lie to compel enforcement of a contract. To the contrary, in *Snyder,* the Colorado Supreme Court made clear that specific performance is the proper remedy for enforcing performance of a contract, as opposed to mandatory injunctive relief, which "prescribes conduct that has not been defined by contract." Further, although *Wheat Ridge* and *Thompson Creek Townhomes* do not expressly state that separation of powers principles prohibit Colorado courts from entering a mandatory injunction compelling performance of a governmental contract, the rationale supporting those decisions necessarily dictates that such relief is not available, at a minimum, in the absence of specific legislative authorization. [*See* pp. 7-9, *supra.*] Thus, while the frivolous nature of this claim is not as patently obvious as Ebert's assertion of its Second and Third Claims For Relief, given the foregoing, Town Center submits that Ebert's continued pursuit of this claim also justifies an award of fees under C.R.S. §§13-17-102(2) and (4).

CONCLUSION

For the reasons stated above, Town Center requests dismissal of Ebert's Complaint along with an award of its reasonable attorney's fees pursuant to C.R.S. §13-17-101 *et seq.*

Dated: September 1, 2023
Denver, Colorado

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on September 1, 2023, a copy of the foregoing was served via Colorado Courts Efiling system on the following:

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