DISTRICT COURT, CITY AND COUNTY OF DENVER, COLORADO 1437 Bannock Street Denver, Colorado 80202	DATE FILED: August 14, 2018 3:05 PM FILING ID: 4FA4813CC86E0 CASE NUMBER: 2018CV31475
Plaintiff: EVERGREEN ALLIANCE GOLF LIMITED, L.P., d/b/a ARCIS GOLF; v. **Defendant:** CLAYTON EARLY LEARNING, AS TRUSTEE OF THE GEORGE W. CLAYTON TRUST, a Colorado Trust.	▲ COURT USE ONLY ▲
Attorneys for Defendant: Jonathan G. Pray, #36576 David B. Meschke, #47728 BROWNSTEIN HYATT FARBER SCHRECK, LLP 410 Seventeenth Street, Suite 2200 Denver, Colorado 80202-4432 Phone: 303.223.1100 Fax: 303.223.1111 Email: jpray@bhfs.com; dmeschke@bhfs.com	Case Number: 2018CV31475 Division:

DEFENDANT'S REPLY IN SUPPORT OF ITS MOTION TO DISMISS

Defendant Clayton Early Learning, as Trustee of the George W. Clayton Trust ("Clayton"), submits the following Reply in Support of Its Motion to Dismiss.

INTRODUCTION

In its Response to Clayton's Motion to Dismiss, Plaintiff Evergreen Alliance Golf Limited, L.P., d/b/a Arcis Golf ("Arcis") never addresses the fatal flaw in its Amended Complaint: the City and County of Denver (the "City") cannot have made a "bona fide offer" as defined in the parties' lease dated December 23, 1998 (the "Lease") that would trigger Arcis's right to first refusal (the "ROFR"). Indeed, because any purported offer (or contract) could not create a legal, valid, and binding obligation upon the City as required by the Lease for there to be

a "bona fide offer" since no agreement was approved pursuant to the City's Charter and Ordinances. Without a "bona fide offer" as that term is defined in the Lease, Arcis's lawsuit is, at best, premature. Arcis is trying to enforce a right that has not matured per the Lease's explicit terms.[1]

Arcis's arguments are nothing but distractions from this fatal flaw. They attempt multiple angles, contending (1) that the City's approval process applies to "contracts" and not "offers," (2) that the City's approval was a "condition" that somehow excuses the Lease's requirement that an offer be a legal, valid, and binding obligation on the City to trigger the ROFR, (3) that Clayton should have inexplicitly exercised "its discretion" to compel the City to approve an agreement and then reverse the City's decision to condemn part of the property, and (4) that, even though the City did not approve an agreement, discovery is necessary regarding the lack of approval. None of these arguments alter the fact that there has been no "bona fide offer" that would trigger the ROFR under the Lease. Clayton's Motion to Dismiss must be granted.

ARGUMENT

A. It Does Not Matter Whether the Applicable Provisions in the Denver Charter and Ordinances Pertain to "Contracts" Rather than "Offers."

Arcis first argues that the City did not have to go through its formal contract approval process for there to be a "bona fide offer" because the City's approval process applies to contracts and not offers. (Resp. to Mot. to Dismiss, at 5). In so doing, Arcis asserts that City agencies and staff may make and negotiate offers absent the need for City Council approval. (*Id.* at 13). This is merely a distinction without a difference. No matter what it is called or how Arcis characterizes it (agreement, offer, contract, etc.), no arrangement with the City provides an

[1] After Arcis filed this lawsuit, it exercised its option to renew the Lease and operate the Park Hill Golf Course on the property.

offer that, if accepted by Clayton, creates a legal, valid, and binding obligation of the City unless the City's first approves it via the mandatory process provided in the applicable charter and ordinances. Without this approval, any offer or contract fails to create the necessary obligation.

For Arcis's ROFR to be triggered pursuant to the Lease, the offer to purchase the property "if accepted by [Clayton], must constitute a legal, valid and binding obligation of the [City]." (Lease, § 24). An "obligation" is "[a] legal relationship in which one person, the obligor, is bound to render a performance in favor of another, the obligee." Obligation, BLACK'S LAW DICTIONARY (10th ed. 2014). As explained in Clayton's Motion to Dismiss, the City cannot have a legal, valid, and binding obligation to purchase the property from Clayton pursuant to the terms of a purported offer unless the offer is first approved through the City's Charter and Ordinances. (Mot. to Dismiss, at 7–9). It is uncontested that the City did not approve an agreement with Clayton pursuant the charter and ordinances.[2] Therefore, the alleged purported agreement never produced a legal, valid, and binding obligation because, if Clayton had accepted the agreement[3] Arcis alleges triggered the ROFR, any resulting contract would be void based on the City's failure to adhere to the mandatory provisions for municipal contracts. *See Cherry Creek Aviation, Inc. v. City of Steamboat Springs*, 958 P.2d 515 (Colo. App. 1998).[4]

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[2] As noted in Clayton's Motion to Dismiss (and uncontested by Arcis), no agreement between Clayton and the City is found in the online version of the Denver City Council's records, which contain all bills and resolutions passed after August 29, 2016, and can be found at https://denver.legistar.com/Legislation.aspx.

[3] Arcis references and attaches to its Response Brief as Exhibit 1 an Agreement Concerning Park Hill Land (the "PSA") that the City did not approve and the parties did not sign.

[4] Arcis contends that the proper interpretation of what the parties intended by an offer being a "legal, binding and valid obligation" raises an issue that is not proper for resolution under Rule 12(b)(5). But what is legal, binding, and valid can be determined solely by existing law. "[C]ontractual language must be interpreted in light of existing law, the provisions of which are regarded as implied terms of the contract, regardless of whether the agreement refers to the

Arcis chooses to ignore this interaction between the ROFR trigger in the Lease and municipal law. Tongue in cheek, Arcis states that Clayton's position is that, for the City to make a "bona fide offer" that would trigger the ROFR, Clayton and the City first would have to negotiate, enter into an agreement in principle, and have the agreement pass by ordinance or resolution, despite Arcis's allegations evincing intent by both sides to be bound by the purported agreement. (Resp. to Mot. to Dismiss, at 5). This, as explained above, is exactly what needed to happen. Because it did not, Arcis has failed to allege sufficient facts that its ROFR was triggered, and Arcis's arguments in its Reply Brief are irrelevant.

The case law Arcis cites illustrates this point. Absent contractual language to the contrary, "when a right of first refusal is involved, once the owners evidence an intent to sell the property, the right of first refusal is activated and converted into an irrevocable option to purchase." *Peters v. Smuggler-Durant Mining Corp*., 910 P.2d 34, 38 (Colo. App. 1995). If the Lease requires only Clayton's and the City's subjective intent to trigger the ROFR, then the information that Arcis obtained in its CORA request might be relevant and could raise factual issues best resolved at summary judgment or trial. (*See* Resp. to Mot. to Dismiss, at 9–13). But the ROFR under the Lease is not triggered merely by Clayton's and the City's intent. When the

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governing law." *Shaw v. Sargent Sch. Dist. No. RE-33-J ex rel. Bd. of Educ*., 21 P.3d 446, 450 (Colo. App. 2001) (quoting 11 Williston on Contracts § 30:19 (4th ed. 1999)). And the Court should not consider extrinsic evidence of the parties' intent in situations such as here where the language is unambiguous. *McShane v. Stirling Ranch Prop. Owners Ass'n, Inc.*, 2017 CO 38, ¶ 16 (explaining that the plain, clear, and unambiguous language of a contract must be enforced "as written," because courts "hold no authority to rewrite contracts and must enforce unambiguous documents in accordance with their terms"). Moreover, "[t]he mere fact that there is a difference of opinion between the parties regarding the interpretation of an instrument does not of itself create an ambiguity." *Radiology Prof'l Corp. v. Trinidad Area Health Ass'n*, 577 P.2d 748, 750 (Colo. 1978).

underlying agreement is with the City, the ROFR can only be triggered if Clayton obtains from the City an offer that would, if accepted, create a legal, valid, and binding obligation of the City.

Moreover, Arcis is protected by the Lease's requirement that an agreement activates the ROFR only when it includes an offer that, if Clayton accepts it, creates a legal, valid, and binding obligation on the City to purchase the property. As Arcis notes in its Response Brief, "[t]he requirement that triggering offers be bona fide serves to disable property owners from extinguishing a right of first refusal by simply relaying vague offers that may include indefinite terms from unidentified third parties." *Uno Restaurants, Inc. v. Boston Kenmore Realty Corp.*, 805 N.E.2d 957, 963 (Mass. Super. Ct. 2004). This policy applies equally, if not more, where the third party is a municipality. If a municipal officer could make an offer or execute a contract to purchase property that triggered a ROFR without first seeking approval through the charter provisions, then Arcis's ROFR could be extinguished based on a "contract" with terms the City never would approve and that would be void if Clayton accepted it. Indeed, Exhibit 7 to Arcis's Response Brief is an email in which the City Attorneys' Office imposes terms on Clayton in addition to those included in the PSA before the City would agree to purchase. This demonstrates that the terms of purchase were not only still in flux but that the City would not have sought (or Clayton received) City Council approval of the PSA as it was drafted. Parties' decisions to back away from a final agreement in part due to a ROFR's presence is but a collateral consequence of having a ROFR in the first place. Arcis's argument would extend the ROFR to apply to contract negotiations—contrary to the language and intent of Article 24 of the Lease.

B. Arcis's Argument Regarding Conditions Presupposes a "Bona Fide Offer" that Never Existed and Would Impose Upon Municipalities a Non-existent Duty.

Arcis next contends that even if the PSA was conditioned upon the City's approval, it still constituted a "bona fide offer" because there is no requirement that "bona fide offers" be unconditional. Arcis relies on a condition in the PSA that states that "[i]t shall be a condition precedent to the execution of this Agreement by the City that the following approvals be obtained: (i) consent to and approval of this Agreement by the Denver City Council; . . .." (Resp. to Mot. to Dismiss, Ex 1, art. IV).

Although Arcis cites cases from other jurisdictions lending support to this proposition in the abstract, these cases are distinguishable because none of them concerned a condition in the offer that also was a prerequisite for triggering the ROFR. The conditions at issue in these cases were that a private party buyer obtain financing and licenses, *Mucci v. Brockston Bocce Club, Inc.*, 472 N.E.2d 966, 968 (Mass. Ct. App. 1985), or be able to acquire other units in a building, *Uno Restaurants*, 805 N.E.2d at 963. None of these cases concerned a ROFR that was triggered only when there was an offer that, if accepted by the seller, created a valid obligation of the purchaser. *See Mucci v. Brockston Bocce Club, Inc.*, 472 N.E.2d 966, 967 (Mass. Ct. App. 1985) (concerning a ROFR that states: "In the event the grantor receives a bona fide offer for the premises the grantor shall communicate the same in writing to the grantee, and the grantee shall thereafter have sixty (60) days in which to purchase the premises for a sum equal to the bona fide offer"); *Uno Restaurants*, 805 N.E.2d. at 960 (construing a ROFR that states: "In the event the Building containing the Demised Premises shall be converted to the status of a condominium, Tenant shall have the right of first refusal to purchase [the property] at the initial purchase price . . . or upon the same term[s] and conditions offered by any other party for the said space").

In other words, while Clayton concurs that agreements subject to a ROFR do not have to be unconditional, in this case there is a prerequisite to triggering the ROFR (*i.e.*, City Council approval for there to be a legal, valid, and binding obligation and thus a "bona fide offer") that never occurred. It is irrelevant that the prerequisite is also a condition. Arcis's argument respecting conditions thus lends it no support.

Arcis's argument that the City had a duty (and thus a legal obligation triggering the ROFR) to use reasonable efforts to make a condition in an unapproved agreement occur also fails. (*See* Resp. to Mot. to Dismiss, at 17–20). In support of its contention that there is a legal obligation to fulfill conditions in the formation of a contract, Arcis cites and quotes Section 225(3) and 245 of the Restatement (Second) of Contracts. Comment a to Restatement (Second) of Contracts § 224 specifies that "condition" as used in the Restatement "denote[s] an event which qualifies a duty under a contract." The Restatement sections therefore are inapplicable to obligations in the formation of a contract. Likewise, the cases Arcis cites from Colorado and other jurisdictions concern the performance of conditions in a valid contract pursuant to concepts such as the covenant of good faith and fair dealing inherent in every contract. *See* Resp. to Mot. to Dismiss, at 18–19 (relying on *Highland Inns Corp. v. A.M. Landmark Co.*, 650 S.W.2d 667 (Mo. Ct. App. 1983) (addressing obligations under a contract to purchase real estate)). These cases are irrelevant because no contract ever existed between Clayton and the City that would form the basis for the implied duty of good faith and fair dealing. *See Amoco Oil Co. v. Ervin*, 908 P.2d 493, 498 (Colo. 1995) (Colorado courts only impose the implied covenant "when the

manner of performance under a specific contract term allows for discretion on the part of either party") (emphasis added).[5] Arcis has cited no authority to the contrary.

Arcis's argument that the City had a duty to seek and obtain Council approval also would impose upon municipalities a legal obligation to use reasonable efforts to seek and obtain approval of any contemplated agreement. Municipalities would lose the discretion to decide whether to approve terms negotiated by government officials, which would usurp the authority of the City Council to pass ordinances approving contracts and the Mayor to veto or sign them. (*See, e.g.*, Charter, § 3.3.5(J)).

Finally, Arcis's contention ignores that the obligation contemplated in the Lease's definition of "bona fide offer" is a purchaser's obligation to purchase the property, not any purported obligation to seek and obtain approval to make the purchase in the first instance. For an offer to be considered a "bona fide offer" under the Lease, "the offer must be in writing and must be an offer to purchase the entire Leased Premises, and, if accepted by Lessor, must constitute a legal, valid and binding obligation of the purchaser." (Lease, § 24). The "obligation" in the Lease thus refers to the obligation to purchase the property pursuant to an accepted offer.

C. Clayton Has Never Possessed Discretion Sufficient to Support a Claim for Breach of the Implied Covenant of Good Faith and Fair Dealing.

Recognizing that no "bona fide offer" may have been made, Arcis falls back on a claim for breach of the implied covenant of good faith and fair dealing. In its Amended Complaint, Arcis alleges that Clayton breached the Lease by refusing to recognize the ROFR. In addition,

[5] There also is no applicable tort duty based on the implied duty of good faith and fair dealing that applies to contractual disputes. *See, e.g., Centennial Square, Ltd. v. Resolution Trust Co.*, 815 P.2d 1002, 1004 (Colo. App. 1991)

citing vaguely pleaded paragraphs in the Amended Complaint, Arcis asserts in its Response Brief that Clayton, in its discretion, declined to obtain City Council approval of the PSA and instead cooperated with the City to devise a plan to condemn of a portion of the property to defeat Arcis's ROFR. (*See* Resp. to Mot. to Dismiss, at 20–21). None of these theories have merit.

First, Clayton does not possess the "discretionary authority to determine certain terms of the [Lease]" that is necessary for the implied covenant of good faith and fair dealing to apply under Colorado law. *See Amoco Oil*, 908 P.2d at 498. Here, the ROFR does not "defer a decision regarding performance terms of the contract," "such as quantity, price, or time." *See id*. Either the ROFR was triggered and Clayton must offer Arcis the option to purchase the property on the same terms, or it was not. Because Clayton lacks discretion to "set or control the terms of performance," *see id.*, the implied duty of good faith and fair dealing is inapplicable, and this claim must be dismissed.

Second, as noted in Clayton's Motion to Dismiss, for Clayton to have "discretion" to refuse to honor Arcis's ROFR, the ROFR must first have been triggered. (*See* Mot. to Dismiss, at 10–11). A breach of the implied covenant of good faith and fair dealing for failure to honor the ROFR would have already constituted a breach of the Lease. Because any discretion that Clayton might possess with respect to notice and recognition of the ROFR occurs only if there is a "bona fide offer" under the Lease, and no "bona fide offer" ever existed, this claim fails.

Third, the decisions to proceed with obtaining City Council approval of the PSA and to condemn of a portion of the property concern are the City's. It is legally impossible for Clayton to possess discretion over these actions. Clayton lacks discretion under the Lease or any other authority to compel the City to force the PSA or any other purported agreement through the City's contract approval process. Only the City can fulfill that condition in the PSA. Moreover,

with respect to condemnation, not only does Arcis misrepresent facts, but even if the factual allegations are accepted as true, Clayton cannot, as a non-governmental entity, possess discretion to require the government to condemn a portion of a property. Condemnation is separate from any sale of the property. Rather, consistent with the City's intentions it made known publicly years before it began negotiating with Clayton to potentially purchase of the property and pursuant to Ordinance Number 2017-1396,[6] which was published on January 5, 2018, the City determined that it was necessary to proceed with the acquisition of certain property interests, including a corner of the Park Hill Golf Course, as part of its storm water detention and flood control project commonly known as the Platte to Park Hill Storm Drainage Project. Clayton cannot possibly have had discretion to avoid or defeat the ROFR through the City's power of condemnation.

D. <u>There Are No Outstanding Factual Issues that Prevent Dismissal.</u>

Arcis contends that it lacks factual information relevant to Clayton's Motion to Dismiss, including whether the parties considered the PSA to be approved and binding at the time, what "pre-approvals" or "pre-authorizations" the City obtained before and after the PSA, and what representations the City made regarding City Council approval. Again, if intent is the standard for determining whether the ROFR was triggered, this information might be relevant. For the ROFR to be triggered, however, the City had to approve the PSA or any other agreement via ordinance or resolution. That never happened. Therefore, it is irrelevant what Clayton or the City thought was binding or what representations were made, and no discovery on this point is needed.

[6] The Ordinance and supporting documents can be found at https://denver.legistar.com/LegislationDetail.aspx?ID=3248914&GUID=59054D95-8A97-4AAB-BA87-28DFF245BB0C.

Arcis understandably is frustrated that Clayton and the City negotiated for the sale of the property for months without the City obtaining the approvals necessary to make an offer that, if accepted by Clayton, would be a legal, valid, and binding obligation of the City. But just as Clayton cannot force the City to approve the PSA or prevent the City from condemning part of the property, Arcis cannot alter the plain terms of the Lease's ROFR provision. The ROFR was not triggered. Arcis still has its ROFR as the parties continue to honor the Lease.

CONCLUSION

For the foregoing reasons and those stated in Clayton's Motion to Dismiss, Arcis's Amended Complaint must be dismissed in its entirety for failure to state a claim.

DATED this 14th day of August, 2018.

BROWNSTEIN HYATT FARBER SCHRECK, LLP

Original signature on file at offices of Brownstein Hyatt Farber Schreck pursuant to C.R.C.P. 121 § 1-26

By: *s/Jonathan G. Pray*
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Counsel for Defendant Clayton Early Learning, as Trustee of the George W. Clayton Trust

CERTIFICATE OF SERVICE

The undersigned hereby certifies that on this 14th day of August, 2018, a true and correct copy of the foregoing **DEFENDANT'S REPLY IN SUPPORT OF ITS MOTION TO DISMISS** was filed with the Court and served via Colorado Courts E-filing System on all he following counsel of record:

s/Penny G. Lalonde
Penny G. Lalonde, Paralegal

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