DISTRICT COURT, LARIMER COUNTY, COLORADO 201 LaPorte Avenue, Suite 210 Fort Collins, CO 80521 970-494-3500	DATE FILED: October 12, 2017 9:09 PM FILING ID: 6BBD7C81AF0B4 CASE NUMBER: 2016CV30362
Plaintiff(s): LOVELAND EISENHOWER INVESTMENTS, LLC, a California limited liability company, **v.** **Defendant(s):** THE CITY OF LOVELAND, THE GREELEY AND LOVELAND IRRIGATION COMPANY, a Colorado non-profit corporation and JOHN DOES 1 through 50	**▲COURT USE ONLY▲**
Josh A. Marks, Atty. Reg. # 16953 David J. Goldfarb, Atty. Reg. # 44070 Mary Sue Greenleaf, Atty. Reg. # 47749 BERG HILL GREENLEAF RUSCITTI LLP 1712 Pearl Street Boulder, CO 80302 Tel: (303) 402-1600 Fax: (303) 402-1601 jam@bhgrlaw.com; djg@bhgrlaw.com; msg@bhgrlaw.com	Case Number: 2016CV30362 Div.: 4C Ctrm.:
DEFENDANT CITY OF LOVELAND'S REPLY IN SUPPORT OF ITS MOTION TO DISMISS, OR IN THE ALTERNATIVE, MOTION FOR SUMMARY JUDGMENT	

Defendant the City of Loveland (the "**City**"), by and through undersigned counsel, submits this Reply in Support of its Motion to Dismiss, or in the Alternative, Motion for Summary Judgment (the "**Reply**") and states as follows:

I. INTRODUCTION

As explained in prior briefing, despite attempts to obscure and complicate the issues before the Court, this dispute is a simple one. Throughout the course of negotiation of the Annexation Agreement and during the years following, LEI never obtained the City's consent to contribute LEI's Chubbuck Ditch rights in satisfaction of the City's water rights requirements for

development, via contract or otherwise. Nonetheless, once advised of the City's prohibition on accepting Chubbuck Ditch rights as a result of the City's 2010 Settlement Agreement with the Greeley and Loveland Irrigation Company ("**GLIC**"), LEI sued both the City and GLIC seeking judicial intervention and a determination that the City is required to exercise its discretion under the City Code as LEI demands, forcing the City to accept water rights that the City cannot use, irrespective of what is in the City's best interests.

For the reasons set forth below, the Response fails to establish the existence of any disputed, material fact that would preclude dismissal of its claims. First, LEI once again establishes that its contractual claims are based upon a theory that the City failed to disclose the existence of the Settlement Agreement and its corresponding effects on the City's future consideration of accepting Chubbuck Ditch water rights into the City's water bank during negotiation of the Annexation Agreement. Accordingly, it is evident that LEI's claims could sound in tort, barring them for lack of subject matter jurisdiction under the Colorado Governmental Immunity Act ("**CGIA**"). Additionally, to the extent LEI does attempt to allege a breach or failure to perform under the Annexation Agreement, LEI's contract claims are both premature and fundamentally flawed as they ignore the discretionary nature of the City's authority to accept ditch water rights under Section 19.04.080 of the City Code. Second, the City's declaratory judgment claim is unwarranted because it seeks to bypass the authority of the Water Court and interfere with the stipulation between GLIC and the City, the City's discretionary authority to accept ditch rights is not legislative, and is time barred by the applicable two-year statute of limitations.

II. REPLY ARGUMENT[1]

A. LEI's First and Second Claims for Relief Should be Dismissed.

1. LEI's contract claims could sound in tort and are thus barred by the Colorado Governmental Immunity Act ("CGIA").

An analysis of the allegations and testimony regarding the bases for LEI's First and Second Claims for Relief reveals that they could lie in tort. Accordingly, those claims are subject to the provisions of the CGIA and must be dismissed pursuant to C.R.C.P. 12(b)(1). LEI's Response on this issue misstates the applicable case law and otherwise ignores LEI's *own* allegations and statements concerning the basis for its claims.

While CGIA immunity does not apply to claims that lie in contract, it does apply to claims that lie or could lie in tort. *See* C.R.S. § 24-10-106. Indeed, it is only where the claim *cannot* lie in tort that there is no immunity. *See Berg v. State Bd. of* Agriculture, 919 P.2d 254, 258 – 59 (Colo. 1996). If the action sounds in tort, the existence of a contractual relationship between the parties "does not change the nature of the action." *Id.* (quoting *Sussman v. Univ. of Colo. Health Sciences Ctr.*, 706 P.2d 443, 444 (Colo. App. 1985)). "By barring not only the tort claim but also claims which could lie in tort, the CGIA requires the court to examine the pleadings and undisputed evidence closely." *Berg*, 919 P.2d at 259. Specifically, the court is to "assess the nature of the injury underlying the claim to determine whether the injury arose out of tortious conduct of the breach of a duty arising in tort and thus whether the claim could lie in tort." *Robinson v. Colo. State Lottery Div.*, 179 P.3d 998, 1005 (Colo. 2008). This analysis is less

[1] The City's Motion seeks dismissal of LEI's First and Second Claims for Relief for lack of subject matter jurisdiction pursuant to C.R.C.P. 12(b)(1) and, alternatively, seeks dismissal of LEI's First, Second, Third and Forth Claims for Relief as a matter of law pursuant to C.R.C.P. 56. In the Response, LEI cites to an inapplicable standard of review for a C.R.C.P. 12(b)(6) motion to dismiss. Since the City's Motion is not based on C.R.C.P. 12(b)(6), the Court should ignore LEI's standard for review. Rather, the appropriate standards for review are set forth in LEI's Motion at pp. 9 – 10.

about what the plaintiff is arguing and more about what the plaintiff could argue. *See id*. at 1005. Thus, "even if a claim exists for breach of contract, it is barred if the allegations in the complaint could also support a tort claim; the claim is not barred only if it arises 'solely in contract.'" *Foster*, 342 P.3d at 501.

As explained in *Robinson*, "certain common law tort claims that are expressly intended to remedy economic loss [] can exist independent of or in conjunction with a contractual claim." 179 P.3d at 1004. Where there is such overlap, "claims that could arise in both tort and contract are barred by the CGIA." *Id.* Applying these principles, Colorado courts have held that even purely economic-loss claims that seek contractual recovery are subject to CGIA immunity if those claims *could* have been framed as tort claims. *See id.* For example, in *Lehman v. City of Louisville* the Colorado Court of Appeals held that the plaintiffs' estoppel claim was barred by the CGIA because the underlying facts could have supported a tort claim. 857 P.2d 455, 456, (Colo. App. 1992). There, plaintiffs considered purchasing a historical church from the City of Louisville for use as both a residence and a business. *Id.* at 456. The plaintiffs "allege[d] that they communicated the intended use" to a city official prior to purchasing the property, "were informed that their intended use [] was permitted under the existing zoning code," and that they relied upon those representations in purchasing and subsequently renovating the property. *Id.* When the City Administrator determined that the intended use violated the City's zoning ordinances the plaintiffs filed an action against the City of Louisville seeking damages and injunctive relief. *Id.* The Court dismissed the *Lehman* plaintiffs' claims as barred by the CGIA, holding that because plaintiffs claimed "that they relied to their detriment upon a

misrepresentation made by a city official" that the essence of the claim was "either a negligent or intentional misrepresentation and, thus, it could lie in tort." *Id.* at 457.

In the Response, LEI tries to recast the nature of its claims as solely contractual and not barred by the CGIA. LEI's efforts miss the mark. The facts of this case make clear that LEI's claims "could be alternatively pleaded in tort," *see Robinson*, 179 P.3d at 1006, regardless of whether LEI has pursued claims for breach of contract or breach of the implied covenant of good faith and fair dealing.

Notably, LEI fails to address its own testimony that it contends that the City misrepresented or concealed its ability to accept Chubbuck Ditch water rights prior to entering into the Annexation Agreement, and that such belief forms the basis of LEI's contract claims. [*See* SUMF ¶¶ 17-18;[2] City SOF ¶¶ 6-7;[3] *see also* Complaint ¶¶ 52-62.] To that end, LEI's principal and designated representative, Greg Parker, testified that LEI believed that the City deliberately withheld the existence and impact of the Settlement Agreement and that the City's decision not to disclose the Settlement Agreement's impact on LEI's ability to contribute its Chubbuck Inches "sold some people down the river in a discriminatory fashion." [SUMF ¶ 18.]

LEI's own materials further amplify the conclusion that its claims could also sound in tort. These materials include the following contentions: (1) that LEI communicated its plans to use the Chubbuck Inches to the City to meet the City's water dedication requirements prior to

[2] The City's citations to the "SUMF" herein refer to the City's Statement of Undisputed Material Facts, set forth in the City's Motion. Although the City references particularized portions of the SUMF or Motion at various points in this Reply, it is the City's intention that the entirety of the Motion be incorporated by reference as if fully set forth.

[3] The City's citations to the "City SOF" herein refer to the City's Response to LEI's Statement of Material Undisputed Facts and Statement of Additional Facts, set forth in the City's Response to the LEI MSJ (the "**City Response**"). Although the City references particularized portions of the City SOF or Response at various points in the Reply, it is the City's intention that the entirety of the Response be incorporated by reference as if fully set forth here, as the Response raises many of the same issues raised and addressed in connection with the LEI MSJ.

executing the Annexation Agreement [*see* Response pp. 3 – 4; Parker Affidavit ¶¶ 13-14, attached as Exh. A to Response; Owen Affidavit at ¶¶ 9-11, attached as Exh. D to Response]; (2) that LEI was informed, via the City Code and advice of City officials, that the City could and historically had accepted Chubbuck Inches for that purpose [*see* Response pp. 4, 7; Owen Affidavit ¶¶ 14-15]; and (3) that LEI relied upon those representations in entering into the Annexation Agreement. [*See* LEI MSJ p. 12 ("the City enticed LEI to enter into the [Annexation] Agreement and continue development of its Project").] In fact, LEI alleged that it relied upon the City's prior course of conduct in forming the understanding that it could utilize its Chubbuck Inches for its proposed development. To that end LEI alleged that it only "understood that its Chubbuck Inches could be acquired and converted by the City for municipal use" because: (1) the City had historically accepted and processed applications for conversion of Chubbuck Inches; (2) because Title 19 of the City Code identified the value of water bank credits attributed to Chubbuck Ditch rights as well as the native raw water storage fees assessed to Chubbuck Ditch rights deposited into the City's water bank; and (3) the City failed to disclose the existence of the Settlement Agreement and its prohibition on continued acceptance and future changes of those rights. [*See* LEI MSJ pp. 8-9; *see also* City Response pp. 11-12.]

Thus, because LEI's claims focus on the City's alleged pre-contractual misrepresentations and/or omissions concerning the existence of the Settlement Agreement and the City's inability to accept and convert Chubbuck Ditch rights to municipal use in water court, those claims could sound in tort, despite the existence of a contract between the parties.

LEI's Response further argues that the City's reliance on *Robinson* is misplaced. [Response p. 14.] This argument misreads and ignores key portions of that Colorado Supreme

Court opinion. In *Robinson*, the Court held that despite the existence of an express contract, plaintiffs' contract claims could lie in tort and were thus barred by the CGIA. *Robinson*, 179 P.3d at 1005. There, plaintiff argued that the injury underlying her claim arose out of the City's failure to deliver what it promised and that she was not arguing that she was "wrongfully induced [] to enter into an unfavorable contract." *Id.* Nonetheless, the Court disagreed, holding that a review of the underlying factual allegations "reveal[ed] that the underlying injury is based on [defendant's] misrepresentations. . . regarding the availability of the represented prizes, which induced the purchase of scratch tickets." *Id.* Like the plaintiff in *Robinson*, LEI has articulated the bases for its claims as follows: "the City enticed LEI to enter into the [Annexation] Agreement and continue development of its Project until December of 2014, when the City finally provided a copy of the Settlement Agreement." [LEI MSJ p. 12.] Because this could be alleged as a tort claim, LEI's claims are barred by the CGIA and must be dismissed.

2. LEI has failed establish that the City's exercise of its discretionary authority to decline acceptance of LEI's Chubbuck Inches breaches any provision of the Annexation Agreement.

Alternatively, even if LEI's First and Second Claims for Relief are determined to be solely contractual and thus outside the CGIA's statutory grant of immunity, dismissal is still appropriate as the undisputed facts establish that the City did not breach *any* express or implied terms of the Annexation Agreement. In order to prevail on a breach of contract claim "a party must show a contract was in existence and that the other party failed to perform some term of the contract." *Coors v. Sec. Life of Denver Ins. Co.*, 91 P.3d 393, 402 (Colo. App. 2003) (emphasis added). The parties do not dispute that the Annexation Agreement contains no discussion of

Chubbuck Inches, much less a requirement or promise that the City will accept and convert those Chubbuck Inches to municipal use. [*See* LEI MSJ p. 18; *see also* City SOF ¶ 21.]

To the extent LEI asserts that the City has breached Section 2.18 of the Annexation Agreement by failing to provide water services, that claim is premature. In fact, Mr. Parker testified on behalf of LEI that the City has not refused to provide water service to the Project. [SUMF ¶ 20.] In its Response, LEI argues for the first time that the City's acceptance and application of ditch water rights in exchange for municipal water credits is one of the "services" contemplated by Section 2.18 and that the City's failure to accept the Chubbuck Inches is thus a breach of that provision. [Response pp. 14-15.] This argument is wholly unsupported by the record and is contrary to a logical read of Section 2.18 of the Annexation Agreement. Notably, LEI fails to provide any citation for this position, noting only that the terms "water services" and "customary municipal services" are undefined in the contract. [Response pp. 14-15.] LEI's argument reads Section 2.18 far too broadly. Indeed, Section 2.18 of the Annexation Agreement defines "customary municipal services" to include things such as provision of "sanitary sewer and potable and non-potable water services and facilities . . . , police and fire protection, snow removal and road maintenance and repair of public streets, and building code enforcement." This section of the contract cannot logically be read to include the City's discretionary acceptance of ditch water rights under the City Code as a "customary municipal service." Further, LEI's own Complaint explains that its breach of contract claim is based on its allegation that the City failed to provide the Project with water for municipal use. [Complaint ¶¶ 63-66.] As the City has *not* failed to provide water service to LEI, this claim is premature.

Furthermore, to the extent that LEI's Response insinuates that the City is not applying the City Code in a "uniform and non-discriminatory manner," in violation of the vested rights provision of the Annexation Agreement, LEI misreads the City Code and ignores key testimony from the City. First, the plain language of Section 19.04.080 of the City Code makes clear that the City is afforded with absolute discretion to accept the transfer of ditch water rights to the City. This provision explains that no water rights shall be accepted "unless first approved by the Loveland utilities commission," upon a finding by that commission "that it is in the city's best interests to accept the ditch water rights." [City Code § 19.04.080(A) (emphasis added).] Thus, by its terms, Section 19.04.080(A) applies equally to all developers who wish to contribute ditch rights to the City in satisfaction of any water rights requirements for development. To that end, Greg Dewey testified that "it rests solely with the Loveland Utilities Commission to decide whether [ditch rights] are actually accepted into the water bank and available for conversion for water rights dedications" and that "any application that would come to the City would have to be approved by the Loveland Utility Commission anyway." [City SOF ¶¶ 21-24.] The Settlement Agreement's terms did not change or alter that discretionary authority and that authority has not been applied against LEI in a discriminatory way. [City SOF ¶ 23.] In asserting otherwise, LEI's argument fails to account for all the language in the Annexation Agreement referencing that the contract is subservient to the City Code. [*See* Motion pp. 17-18.][4] Accordingly, LEI has no basis

[4] *See* Annexation Agreement at § 2.3.1.4 (noting that the Annexation Agreement and the "establishment of vested property rights . . . will not preclude the application . . . of . . . the Municipal Code"); *see also* Annexation Agreement at § 2.33 ("The Parties agree that except as otherwise provided in this Agreement, that all other applicable Municipal Code provisions, regulations, standards, rates, fees and charges in effect at time of development shall apply to any future development of the Property.") and § 2.28 ("Nothing contained in this Agreement shall constitute or be interpreted as a repeal of the City's . . . Code or ordinances. . . .").

to claim that the City Code, and specifically the discretionary authority to accept ditch water rights, has been applied in a discriminatory fashion.[5]

Finally, the Annexation Agreement does not, as LEI suggests, provide LEI with a "vested right" to dedicate its Chubbuck Inches to meet LEI's water dedication requirements. Generally, if a developer such as LEI has a vested right, it cannot unilaterally be taken away by a public entity. *See* C.R.S. § 24-68-105(1). However, there are two fundamental flaws with LEI's "vested rights" analysis. First, while a vested right may prevent an action or an approval that has taken place from being undone, you first have to establish that you have a vested right to be enforced. This is where LEI's claim fails. The Annexation Agreement never gave LEI a vested right to contribute their Chubbuck Inches. LEI has a vested right to the land use approvals and zoning that was put in place, *see* Annexation Agreement § 2.3, but LEI is not claiming that the City has breached or failed to honor those provisions. Rather, LEI argues that the City has altered its position regarding acceptance of Chubbuck Ditch rights. But, as LEI has admitted, the Annexation Agreement fails to even mention, much less require acceptance of, Chubbuck Ditch rights. [*See* Response p. 18.] Second, another benefit of having a vested right is the application of a fixed set of rules. LEI's Response appears to argue that because the Annexation Agreement afforded them a vested right to undertake and complete the development, that the City cannot change the underlying rules applicable to that development on them. As it relates to LEI's Chubbuck Inches, that argument also fails because the City has not changed the applicable rules. As discussed above, the City Code afforded the Loveland Utilities Commission complete

[5] LEI's reading of the Section 19.04.080(A) as lacking any sort of broad discretion on the part of the City due to the City's historical conduct in accepting Chubbuck Ditch rights is irrelevant. The fact that the City has or will exercise its discretion differently due to the Settlement Agreement does not amount to discrimination. "Discretion is discretion is discretion," and the fact that one has exercised it in a particular way previously doe not require it to be done that way in the future. *See Jones v. Lane*, 568 F.Supp. 1113, 1115 (N.D. Ill. 1983).

discretion in accepting ditch water rights both before and after the Annexation Agreement was entered into. Notably, the only thing that has changed since 2010 is that the Settlement Agreement gave the City a greater disincentive to continued acceptance of Chubbuck Ditch water rights because the City is prohibited from using or converting those rights. So, while the factors that the City may consider in deciding whether to accept ditch rights may have changed, the Loveland Utilities Commission's absolute and broad discretionary authority to determine whether to accept ditch water rights into the City's water portfolio has never changed.

For these reasons, LEI cannot establish that the City has breached any provision of the Annexation Agreement, warranting judgment as a matter of law dismissing that claim.

3. <u>LEI's Second Claim for Relief ignores the City's ability to exercise its discretion under Section 19.04.080 of the City Code as it relates to accepting Chubbuck Ditch rights.</u>

As explained in detail in the Motion and in the City's Response to the LEI MSJ, the City's refusal to accept LEI's Chubbuck Ditch rights is *not* a breach of the implied duty of good faith and fair dealing. While mandating that the City accept LEI's Chubbuck Ditch rights would effectively insert new, substantive, and contradictory terms into the Annexation Agreement in violation of Colorado law, as the Annexation Agreement undisputedly contains no requirements whatsoever with respect to the acceptance of particular water rights, LEI's claim has a much more fundamental flaw that LEI fails to appreciate or combat. This Court lacks jurisdiction to compel a municipality such as the City, to exercise its discretion in a particular way, as that "implicates an additional concern for the separation of governmental powers." *Wheat Ridge Urban Renewal v. Cornerstone Grp. XXII, L.L.C.*, 176 P.3d 737, 745 (Colo. 2007); *see also Thompson Creek Townhomes, LLC v. Tabernash Meadows Water & Sanitation Dist.*, 240 P.3d

554, 556 (Colo. App. 2010) (denying developer's efforts to compel sanitation district to reserve and make available a specific number of water taps). LEI tries to distinguish these holdings on their facts. But, the holdings in these cases are not limited to their facts and apply very broadly to circumstances where a party requests the judiciary to compel local government to exercise its discretion in a certain manner. As a result, this Court does not have jurisdiction to wade into issues concerning the propriety of the City's exercise of its statutory discretion due to the necessary separation of powers in granting the relief sought by LEI.

To the extent that LEI argues that equity requires the Court to rewrite the Annexation Agreement to allow LEI to seek damages as a result of this case law, LEI's position is completely unsupported. The City is not asking the Court to invalidate or void Section 2.25 of the Annexation Agreement. Indeed, specific performance may remain an available remedy to LEI under appropriate circumstances. However, the Court cannot compel the particular "specific performance" that LEI seeks without running afoul of the appropriate separation of powers as LEI's claim essentially asks the Court to require the City accept LEI's Chubbuck Inches and exercise its discretion under the City Code in contravention of the directive to act in the City's best interests. Accordingly, LEI's second claim must also be dismissed.

B. <u>LEI's Third Claim for Relief for Declaratory Relief is Unwarranted.</u>

LEI's Third Claim for Relief seeking a declaration that the Settlement Agreement is invalid fails the following reasons: (1) the claim seeks to bypass the authority of the Water Court and interfere with the stipulation between GLIC and the City; (2) the City's discretionary authority to accept ditch rights is not legislative; and (3) the claim is time barred. LEI's Response fails to set forth any disputed issues of material fact that dispel these bases for dismissal.

First, LEI's declaratory judgment claim seeking invalidation of the Settlement Agreement would impermissibly interfere with the exclusive powers afforded to the water court under C.R.S. § 37-92-203(1). Notably, Colorado law requires that the water court "give effect to the stipulations of the parties" in a water court case. *See USI Props. E. Inc. v. Simpson*, 938 P.2d 168, 173 (Colo. 1997). Each stipulation and settlement listed in the decrees at issue in this case, including GLIC's settlement with the City regarding changing Chubbuck Inches, forms an integral part of the decree and must be given effect by the water court. *See USI Properties*, 938 P.2d at 173. LEI does not dispute that it did nothing to seek to intervene to protect its own interests in the water court cases. [Response pp. 20-21.] Rather, LEI illogically argues that the dispute raised by its Third Claim for Relief is not a "water matter" subject to the exclusive jurisdiction of the water court. [*See id.*] Specifically, LEI asserts that it "is not seeking to change the use of its Chubbuck Inches," but rather "is seeking to enforce the provisions of" the Annexation Agreement and the 2010 version of the City Code. [Response p. 20.] However, LEI's Third Claim for Relief expressly requests that the Court invalidate the Settlement Agreement's prohibition on the City's acceptance of Chubbuck Inches as an unlawful delegation of the City's legislative authority. [*See* Complaint ¶ 80.] This is independent of the breach of contract and implied covenant claims – so it is a direct attack upon an aspect of a water court judgment and squarely within the jurisdiction of the water court. LEI's Response fails to address this and further fails to provide any explanation of how such a determination does *not* interfere with the water court's exclusive jurisdiction under Colorado law.

Second, in trying to avoid the jurisdictional problem addressed above, LEI mischaracterizes what its Third Claim for Relief actually seeks – invalidation of the Settlement

Agreement's prohibition on the City's use and future conversion of Chubbuck Ditch rights as an unlawful delegation of the City's legislative authority. As discussed above, Section 19.04.080(A) affords the City broad discretion in determining whether to accept ditch water rights, including Chubbuck Ditch rights. [*See Supra*, III.A.3.] LEI attempts to equate this discretionary authority with "rate-making," which is contrary to the case law cited and borders on frivolous for the reasons set forth in the Motion at pages 19 – 20, and reiterated in the City Response at pages 18 – 21. Because "rate-making" or "rate-setting" concerns only the "rates, fees, tolls and charges" to be assessed by the municipality providing water service, it has absolutely no bearing on which water rights a municipality may choose to accept into that municipality's water portfolio in satisfaction of its legislative water rights requirements. *See* C.R.S. § 31-35-402(f). Accordingly, LEI position that the Settlement Agreement's prohibition on the acceptance and future use or attempt to change Chubbuck Ditch rights is legislative in nature is wholly unsupported, warranting the entry of summary judgment in the City's favor on LEI's Third Claim for Relief.

Third, LEI's declaratory relief claim should be dismissed for failing to meet the applicable two-year statute of limitations applicable to claims against governmental entities. *See* C.R.S. § 13-80-102(1)(f)). While LEI does not dispute that this is the applicable statute of limitations and that the case was not filed until April of 2016 [*see* Response pp. 21-22], the Response fails to acknowledge or give adequate credence to LEI's knowledge of the material facts giving rise to its claims in January of 2014.

In Colorado, a cause of action of the sort brought by LEI generally accrues on the date both the injury and its cause are "known or should have been known in the exercise of reasonable diligence." C.R.S. § 13-80-108(1); *Harrison v. Pinnacol Assur.*, 107 P.3d 969, 972

(Colo. App. 2004). Accordingly, "the statute of limitations begins to run when the claimant has knowledge of facts which would put a reasonable person on notice of the nature and extent of an injury and that the injury was caused by the wrongful conduct of another." *Miller v. Armstrong World Indus., Inc.*, 817 P.2d 111, (Colo. 1991). "The plaintiff need only know or have reason to know the facts that underlie or are essential to the cause of action, but need not know the precise legal theory upon which the action may be brought." *Colburn v. Kopit*, 59 P.3d 295, 297 (Colo. App. 2002). While a statute of limitations defense generally raises issues of fact, "where it is shown that the plaintiff discovered, or reasonably should have discovered, the alleged tortious conduct as of a particular date, the . . . issue may be decided as a matter of law." *Id.*

Contrary to LEI's insinuation that it was not informed of the Settlement Agreement and its prohibition on the transfer and conversion of Chubbuck Inches until December of 2014, LEI admitted that it became aware that Chubbuck Inches were no longer acceptable for transfer to the City in January of 2014. [*See* Response to Interrogatory No. 1, attached as **Exhibit A**.] For that reason, LEI knew, or should have known, of the basis for its declaratory judgment claim as of January of 2014. Accordingly, that claim is time barred and must be dismissed.

III. CONCLUSION

In light of the arguments made in the Motion and this Reply, the City respectfully requests the Court to dismiss LEI's First, Second, Third and Fourth claims pursuant to C.R.C.P. 12(b)(1) for lack of subject matter jurisdiction, or in the alternative, to enter summary judgment in the City's favor pursuant to C.R.C.P. 56.[6]

[6] Because LEI cannot establish a right to relief on its First, Second or Third claims for relief, its Fourth Claim for Relief must similarly fail since it is a derivative of LEI's other causes of action. [*See* City Response pp. 21-24.] For that reason, summary judgment must enter in the City's favor on LEI's injunctive relief claim as well.

Respectfully submitted this 12th day of October, 2017.

BERG HILL GREENLEAF RUSCITTI LLP

[Pursuant to Rule 121, the signed original is on file at Berg Hill Greenleaf Ruscitti LLP]

s/ Josh A. Marks

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DJ Goldfarb
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CERTIFICATE OF SERVICE

I hereby certify that on this 12th day of October, 2017, a true and correct copy of the foregoing **DEFENDANT CITY OF LOVELAND'S REPLY IN SUPPORT OF ITS MOTION TO DISMISS, OR IN THE ALTERNATIVE, MOTION FOR SUMMARY JUDGMENT** was served electronically via ICCES and/or by depositing same in the U.S. Mail, postage prepaid, addressed to the following:

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s/ Mary Sue Greenleaf

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